

The Israeli Supreme Court and the Separation Barrier

A critical review of the “Beit Sourik” decision: HCJ 2056/04

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The complexity and controversy of the issue at hand has proven to be a challenge for the author during the process of writing this thesis. Striving to describe a reality which is remote from my own and is reflected in very different ways in the political discourse, the aim has been to find a ground which does not make a trifle on any of the conflicting parties' sufferings. The topic is overlapping many political and law related spheres. Without the help of the people listed below, the process would have been by far more difficult.

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I am alone responsible for the contents of the thesis and for eventual mistakes I bear the whole responsibility.

Karl Olav Grønlund Sørensen - Oslo, October 2006

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List of Abbreviations

ISC – Israeli Supreme Court

HCJ – High Court of Justice

OPT – Occupied Palestinian Territories

IHL – International Humanitarian Law

IL – International Law

HR – Human Rights

IMFA – Israeli Ministry of Foreign

Affairs

GSS – General Security Service [Israel]

PA – The Palestinian Interim Self-
Government Authority

“The Six-Day War was forced upon us; however, the war's seventh day, which began on June 12, 1967 and has continued to this day, is the product of our choice. We enthusiastically chose to become a colonial society, ignoring international treaties, expropriating lands, transferring settlers from Israel to the occupied territories, engaging in theft and finding justification for all these activities. Passionately desiring to keep the occupied territories, we developed two judicial systems: one - progressive, liberal - in Israel; and the other - cruel, injurious - in the occupied territories. In effect, we established an apartheid regime in the occupied territories immediately following their capture. That oppressive regime exists to this day.”

-Michael Ben-Yair, Israeli Attorney General, 1993-1996 in Haaretz, March 3, 2002

“It is a myth to think that we can maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that a judicial ruling will be valid only during wartime and that things will change in peacetime. The line between war and peace is thin—what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long term. Since its founding, Israel has faced a security threat. As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock.”

- Aharon Barak, President of Israel Supreme Court (1995-2006), in *“Judgments of the Israel Supreme Court: Fighting Terrorism within the Law”*, Jerusalem 2005.

1 Interest of Research - Contextualization:

In this thesis I focus on legal complications of fighting terrorism. Democracies are faced with a threat that fights outside the laws. Imposing restrictions on liberties and rights in order to constrain the threat may be argued necessary; nonetheless it challenges one of the pillars of democracy itself: the rights and liberties of the individual. The state of Israel has, as occupant of the Palestinian Territories since 1967, faced international – and domestic – criticism concerning the rights of the Palestinians. The Supreme Court of Israel (ISC), sitting as the High Court of Justice (HCJ), has by its judicial annexation of the Palestinian Territories faced the dilemma of the competing values of Israeli security and Palestinian human rights for decades. The recently retired President of the ISC (September 7, 2006), Aharon Barak (ibid: 10) describe that:

“Fighting against terrorism in an effective manner entails finding the right balance between security and public interests, on one hand, and the need to safeguard human rights and basic freedoms, on the other. This is a very complex process.”

Critics of the HCJ like Baruch Kimmerling (2002: 1121) claims that the laws are not equal to everyone. Liberal rhetoric in rulings and statements give the impression of legal equality but do not create precedence and are often so vague that the initial problem is not actually solved. Kimmerling (ibid) is by no means moderate in his article “Jurisdiction in an Immigrant-Settler Society” which “*will demonstrate that the practices of the Israeli HCJ generate a façade of legitimacy to the Israeli state’s internal and external colonization and territorial expansion efforts.*”

Aharon Barak pointed out above that the ISC needs to ensure that the state of Israel is respecting the rule of law also in times of conflict. The dilemma of Israeli security and preservation of Palestinian rights is often exaggeratedly viewed as a zero-sum game by both parties: Neither interest can be satisfactory fulfilled without reducing the others. Without a matrix of control¹ over the occupied Palestinian territories

¹¹ Halper, Jeff (2004) “Obstacles to Peace – A reframing of the Palestinian - Israeli conflict” The book is a critical examination of the Israeli occupational system by the former Professor in Anthropology at the Ben Gurion University, who now is the leader of Israeli Committee Against House Demolitions (ICAHD).

(OPT) the frequency of terrorist attacks would definitely increase in lack of a complete political solution. At the same time, the matrix of control is splitting the West Bank up in Bantustans, hindering free movement of the individual, choking the Palestinian economy and in lead to hardship in the life of the Palestinians which again fuel the conflict. Additionally, the conflict has been viewed as a typical territorial conflict: Neither parts have alternative homelands and is frequently referred to by both parties as a *conflict of existence*. After the breakout of the second Palestinian intifada², the wave of terrorist attacks gained political and public support to the old plans of building a separation barrier³ to separate Israelis and Palestinians.

The Israeli professor Ronen Shamir (1990, in Kimmerling 2002: 1121) stress that a Court's impartiality is a prerequisite if they are to play a legitimizing role. Studies suggest that courts systematically support and uphold state-sponsored policies. Shamir claims that analysis of cases where the HCJ ruled to defend Palestinian's and Israeli Arab's human rights did not lead to similar results in subsequent cases and the significance of the cases was exaggerated, allowing them to appear as symbols of justice.

The ISC enjoys a special position in Israeli in the public opinion and in the political system of Israel, which enables it to be a possible unique actor in terms of reducing tension between Israelis and Palestinians. The initial question would be if it manages, or even has the possibility, to be truly impartial as an integrated part of the Israeli state. This thesis addresses implications of exercising judicial review over the military authorities' actions in an occupied territory, being the sole guarantee of the individual rights of the conflicting party.

1.1 Research Problems and Nature of the Research

Following the liberal rhetoric of the Aharon Barak and the criticism from scholars, organizations and others⁴ I would like to do an analysis of the ISC, sitting as High Court of Justice, ruling of 30th of June 2004; HCJ 2056/04 – *Beit Sourik Village*

² Intifada is Arabic for "to shake off" and is used about the ongoing and first Palestinian uprising (1988-91).

³ I will use the term "seperation barrier" for the fence / wall built in the West Bank, a discussion of the use of term on the barrier will be discussed in chapter 4.

Council v. 1.The Government of Israel and 2.Commander of the IDF Forces in the West Bank. The ruling was made 10 days prior to the advisory ruling on the security fence made by the International Court of Justice in Hague and got a lot of attention. It appeared to be a “landmark case” ruling against the legality of the orders of taking possessions of land north-east of Jerusalem and to erect a separation fence on the land. The *Beit Sourik* ruling was the first ruling where the HCJ extensively reviewed the legality of the separation barrier and its route. In light of the criticism of the Supreme Court cited above, I will do an critical review of the HCJ 2056/04 ruling as it is stated in the Piskei Din⁵. The research questions of my thesis are:

1: *“Did the HCJ decision in the Beit Sourik case serve as a meaningful constraint on the military commander in the West Bank’s authority to erect a separation barrier in the Occupied Palestinian Territories or did it on the contrary create a façade of legitimacy?”*

2: *“In applying the test of proportionality, weighing the two competing values at hand, was a meaningful analysis on the military commander’s inherent different interests of Israeli security in the area and his obligations to take the local inhabitations needs into account, to limit his powers?”*

Subordinate research questions in form of operational sets will help in defining nuances that are within my research question will be presented as a checklist of questions. The very nature of the research question is indeed explorative, yet appropriate operational set will make the nuances in the considerations behind the decision made by the Supreme Court visible.

Due to a lack of extensive available academic literature on both the Israeli Supreme Court and the security barrier, this thesis will be a path less traveled by, a path quite new to me. One additional aim is create a critical analytical framework applicable to other rulings of the Israeli Supreme Court regarding the OPT. I would like to emphasize that when formulating the research question I have not expected to not find either / or answers. This lies in the nature of the topic as it in essence is how a dilemma was handled judicially.

⁴ Note that the Supreme Court at the same time meets criticism from groups and persons that think that it imposes its will in the Israeli political life, especially in exercising judicial review over the military authorities’ actions in the OPT.

⁵ Piskei Din are the official reports of Israeli Supreme Court decisions.

2 Research Method

The analysis of such a matter will truly require both the researcher and the reader to hold on to more than one thought at a time. A clear and well founded methodology and design is the first step to ensure this.

2.1 Case Studies

Researchers and scholars have discussed the scientific value of case studies for years. As stated above the case study is a wide term in political science, yet it is a tag widely used in international politics studies. My approach to the problem and research questions indicates that a case study is the most appropriate choice of research method and has the greatest potential to give answers to my research question. Following Robert K. Yin's (2003: 9) argumentation, the case study method would be used because "*you deliberately want[ed] to cover contextual conditions – believing that they might be highly pertinent to your phenomenon of study.*" A case study has a distinct advantage when "how and why" is being asked about a contemporary set of events over which the investigator has little or no control." This description fits my scope of research and the highly complex and varied context of the unit being researched; the Beit Sourik *Piskei Din*.

My case study is obviously of a single-case design of holistic nature. The Beit Sourik Piskei Din is analysed within its context. Two of the rationale's for using a single case study is when it represents a *unique* case or when it is the *representative* or *typical* case (ibid: 40-41). This design is applicable as my research problem is in essence: Was it a *typical* ruling of the ISC as critics like Baruch Kimmerling (2002: 1121) claims previous "landmark cases" has given a "façade of legitimacy"? Or was it a real victory for the Palestinian petitioners, where the ISC protect their rights as it would seem at the first glance in the media coverage after the ruling in May 2004?

2.2 Research Design and Structure

My thesis does not follow a particular pattern of research in theory, school, except being a case study in international politics, which itself is a usual, but wide description for a research project. The fields involved are among others: International

law, security politics, human rights and the ISC as a political institution. In my opinion a clear cut and well founded structure and is essential in order to reach the designated goal. This is obviously not a law thesis, but rather a political science application to a law issue in a highly complex political context. Hence, I have chosen to include theoretical aspects that highlight different. A theoretical background enables a better founded discussion of the object in the research unit: the separation barrier, and the subject giving it: The Israeli Supreme Court. The following pre-analysis, or historical review, of the HCJ and the OPT will shed light to questions and suggest patters relating to my research. The temporary findings will enable me to narrow the scope even further and additions to the operational set presented will specify just what to look for in the *Beit Sourik* ruling.

2.3 Methodological Considerations

There are methodologically problems connected with this kind of case study both regarding generalising potential, validity and reliability. Is the operational set sufficient? Are the findings biased? (ibid: 34-36) In a case study such as this, one has to be aware of these issues.

2.3.1 Generalisation – External Validity

To subtract general truths from a single case study is highly problematic. My conclusion findings will only be applicable to the very case I am examining. However, the analytical framework created up to the analysis has a nature that will either strengthen or weaken, at whole or partially, the different aspects of criticism of the Court's rulings regarding petitions from Palestinians in the OPT. The lack possibilities of empirical generalisations is obvious, I only examine one specific case in this thesis. However, my findings will increase or decrease the suggested pattern of rulings presented in parts of my theoretical approach and in the following discussions. One has to distinguish between the tests of these critical arguments applied on the Beit Sourik case and to make it a general truth. Each specific case has a set of attributes that in major or minor degree differ from the case examined here. In sum, the findings of this study do not have a generalisation quality, yet the analytical framework could provide a tool to which generalisation could be possible if applied

on several cases. This again raises a question if the theories and discussions leading to the operational set are adequate to discover the aspects in the ruling at hand. If not, I would argue that the scientific value still exists in the quality of highlighting limitations in the theories' and general analytical framework to such cases.

Shortly, the generalisation potential of the framework applied to several cases; convergence in findings would increase the validity of the findings in this study. Nuances discovered between the findings would again increase the reliability of the studies, as different aspects of the phenomenon investigated would be revealed. The discussion of the HCJ and the OPT in chapter 6 should not be confused with such an application of the analytical framework to similar cases. The discussion is mainly a secondary analytical discussion revealing points for examination in my analysis of the research unit.

2.3.2 Validity

My research questions are questions which in short say: Was it, or was it not? The conclusions will rely on if my operational set suggests either one of them generally or more likely the nuances of aspects in the ruling. The validity problem of my research is of a constructional art. One methodological challenge is to develop a sufficiently operational set of measures, which is not "subjective judgments (...) used to collect the data" (Yin 2003: 35). I would argue that the single case selection, the awareness of generalisation limitations and the examining type of research problem all contribute to reduce this potential problem of validity. A bigger problem is the selection of theory and arguments leading to the operational set. A case can be interpreted quite differently given the theoretical settings and conceptual lenses used. Again, the test of the criticism that ISC has faced from Kimmerling and others is triangulated with security theory – namely the local Israeli security problem of terrorism from Palestinians in the occupied territory, and a theory of political subsystems and constitutional principles in Israel - Palestine. The discussion in chapter 6 will include the arguments of the critics, as well as the law-theoretical arguments of Aharon Barak and David Kretzmer. An operational set based on only

critical arguments without taking the mentioned aspects into context would indeed be highly problematic in terms of bias.

Another aspect is the causal linkage between the ISC as an “integral part of settler-immigrant society, which maintains its own logic and interests and which must maintain for itself a territorial living space” (Kimmerling 2002: 1128) and my research problems. The theoretical approach I and II does imply such a causal mechanism. A problem of internal validity arise dealing with causal effects in case studies. Could eventual patterns discover during examination of the rulings in chapter 6 applied in the analysis of the *Beit Sourik* ruling be explained by a different mechanism than the one stated above? (Yin 2003: 36) In my opinion, the linkage is seemingly so obvious that it must have a great effect on the rulings, just as the special security situation of Israel displayed in approach III, that the problem of internal validity is unproblematic.

2.4 Triangulation

As discussed in a previous paper: “*The Rationale behind and the Limitations of the Triangulation Paradigm*”⁶ the common claim that triangulating in any form increases the validity of the research is problematic. The logic of triangulation is based on the premise that no single method ever adequately solves the problem of rival explanations (Massey, A. 1999: point 1): . Michael Q. Patton (1999) claims that because “*each method reveals different aspects of empirical reality, multiple methods of data collection and analysis provide more grist for the research mill.*” The four types of triangulation are: i) *data triangulation* - multiple methods in data collection and data sources; ii) *investigator triangulation* – multiple investigators; iii) *methodological triangulation* – multiple methodological frameworks and iv) *theoretical triangulation* – multiple theoretical frameworks (ibid: 1193).

In the debates of triangulation, two meanings of the terms have emerged: a) Triangulation as a process of cumulative validation or b) triangulation as a means to produce a more complete picture of the investigated phenomena (Kelle, U. 2001:

⁶ Enclosed as attachment 1: “Triangulation Paradigm”

para. 8). The two principal aims of triangulation are: convergence and completeness (Knafl and Breitmayer in Massey 1999: point 1.3) or in other words: validity and reliability. The three types applicable to my research are data, methodological and theoretical triangulation.

2.4.1 Data and Methods

The research unit: the Piskei Din of the HCJ 2056/04 ruling will stand alone as I will not use reports or commentators opinions on the ruling itself in the analysis. To do so, would break with the concept of creating my own framework and remove others' analysis from their ontological and epistemological belonging. The discussion of the separation barrier and the Israeli Supreme Court will rely on two or more data sources (documents, websites, etc) in all aspects. Within the frames of this research I have no possibility to examine the truthfulness in the data used, so I have to choose my sources subjectively from respected academics, scholars, governments and organizations and at the same time maintain a critical mind to minimize the potential threat of bias. A lack of available sources goes especially for the second hand discussion on the HCJ and the OPT in chapter 6. David Kretzmer⁷ is a widely respected academic and whose book used: "The Occupation of Justice. *The Supreme Court of Israel and the Occupied Territories*" is the first comprehensive discussion on the subject at hand. As most of the discussion in chapter 6 will be based on his work, I will strive to triangulate his analysis with Aharon Baraks arguments in chapter 6.3.

The use data triangulation within the method of document analysis will not be taken as a mean of increasing the validity of the study. Consistencies or inconsistencies can appear to be so because the results from the two (or more) sources have been removed from their fuller context of meaning; their authors belonging to tradition of school, their position in the relevant context and aim of analysis and methodological approaches. Hence, the triangulation will serve mostly to increase the reliability of the phenomenon studied.

⁷ David Kretzmer is Bruce W. Wayne Professor of International Law at the Hebrew University of Jerusalem. He was vice-chair person of the United Nations Human Rights Committee (2001-2002) and was elected as member of the International

2.4.2 Theory Triangulation

The theoretical triangulation already presented is obviously necessary when examining a case that is so complex and also politically sensible. Theory triangulation is originally meaning to examine one point – the research unit – within different theoretical frameworks. I have chosen to create a framework with different theoretical approaches. Recalling the previous validity discussion concerning different data's belongings, I would argue that the same applies to theoretical triangulation. Each theory belongs to their own context, and even though the spheres (like international law, judicial review and security policies) interfere and overflow their respective boundaries they have their own logics, presumptions and qualities. The reasoning behind including the different approaches is subjective and demands awareness when analysing and concluding on the findings. Again, I argue that triangulation of theories to create a framework serves the purpose the reliability, rather than the validity of the findings.

2.5 Methodological Conclusions

The phenomenon investigated is complex; it deals with competing values and interests and is multifaceted. It will be, to be modest, a challenge to be able to catch all the dimensions in order to be able to see the whole picture. The research design I have presented with the different types of triangulation is necessary in terms of the reliability of the study. I would argue that the nature of the subject with its competing values and interests itself is a constraint to the validity of the study. There is limitations of saying what is right and what is wrong in such a dilemma. However, the critical approach is not selected randomly. The discussed generalisation problems and the validity constraints on single case research makes the conclusions applicable to the case of Beit Sourik. The later impact of the ruling, does however suggest a possibility to state a tendency. Resonance to the critical arguments in findings does not make the universal “truths” – it makes the critical arguments true, partially true or false in the specific case examined according to patterns discovered in the pre-analysis and strengthen, does not alter or oppose the criticism.

3 Theoretical Framework

The approaches within this framework are complementary in general, increasing the ability to discover different aspects of the ruling in the *Beit Sourik* Case. One main purpose of the theory chapter is – given the territorial security situation of Israel – to give a theoretical background to the question if the Supreme Court is able to check and balance the governmental actions in the OPT while being an integrated part of one of the conflicting parties. Another is to give a theoretical and precise description of the Israeli security reality to which the separation barrier is one of the measures taken to deal with the threat picture perceived by the Israeli government.

3.1 Approach I: Israel as a Multilayered Regime

In his article “Accommodating Conflicting Claims to National Self-Determination. The Intractable Case of Israel / Palestine.” Nils Butenschøn⁸ (2006: 286) “examines the conflict in terms of a general typology of political regimes for managing or eliminating ethnic conflict in deeply divided societies”. Butenschøn asks some central questions; *who are the parties* and *what kind of conflict is this?* More specifically, he asks (285): “*Who constitute the demographic constituency, the demos, of a future democratically based political order? Does this demos constitute a singular political (or national) community, or separate political (or national) communities?*” The conceptual framework is of relevance to my research question. In particular I wish to discover what political subsystem(s) the ISC derive from and exercise judicial review over, *who* constitute the demos, *within* which territory (Israel and the OPT) and under *which* constitutional principles these communities or the *demos* are organised.

The conflict of Israel – Palestine is of a typical territorial art (288); with interstate wars between Israel and its Arab neighbour states and an inter-ethnic core between the Palestinians and Israelis. Despite the effort of various peace processes and negotiation, the question of national self-determination is to this day unresolved. Butenschøn (288-289) points out that a main characteristic of the Israeli-Palestinian conflict can be derived from a legal perception of the way the principle of self-

⁸ Nils Butenschøn is a political scientist conducting his research at the Norwegian Center of Human Rights, University of Oslo.

determination has been interpreted and applied. The international community has directly contributed to the conditions of intractability of the conflict as incompatibility of the conflicting claims from the very start was inherent in declarations, treaties and agreements related to the future political organisation of Palestine

3.1.1 Constitutional Principles

Butenschøn (291) use a typology of regime formation to show implications of ethnic differences for the political organisation of state territories in terms of rights distribution.⁹ The typology is based on a critical reading of Arend Lijphart's model of "consociational democracy" which gives a design for democratic politics in plural societies to solve group-based conflicts in a model of power-sharing. The weakness of the model is that it has a tendency to "*preserve the cleavages in society, creating institutional obstacles to political integration.*" (292) The following typology is suggested for outcomes in terms of regime formations of alternative strategies for eliminating or managing ethnic differences:

Constitutional Principles	Territorial Principles		
	<i>The Unitary State</i>	<i>The Non-Unitary State</i>	<i>Separate Territories</i>
<i>Singularism</i>	Ethnocratic systems	Imposed/dominated self rule	Ethnic 'Homelands'
<i>Pluralism</i>	Consociational systems	Cantonization, ethnic federation	Partition/separate states along ethnic lines
<i>Universalism</i>	Majoritarian systems	Regionalisation, functional federation	Partition/separate states along functional lines

Fig. 1. Political Organisation of State Territories. A typology. (ibid: 292)

The constitutional principles refer to the normative foundation for distributing rights in a political community (292). *Singularistic* systems organise themselves to protect the titular "self" against being assimilated into larger collectives or intruded by other "selves". It refers to deeply divided societies where state as a political organisation is

⁹ Butenschøn use the term "state territories" instead of societies, underlining that one can not take for granted that the Israelis and Palestinians compromise one society. The unit under discussion is the territory of Palestine as defined by the League of Nations. Ibid, footnote 20, p. 291

considered to be the embodiment of the identity and aspirations of one of the contending groups. The role of the state in a *pluralistic* society is not to promote a “specific communal or ethnic identity, but to facilitate politics of compromise that give the different groups a fair say in national politics, ensuring power-sharing of in the terms of a consociational system. *Universalism* refers to the normative presumption that group-identities are irrelevant to the distribution of rights in a society. From a human rights perspective, Butenschøn claims (293):

“would be unacceptable to the extent that such solutions take a hierarchy of ethnic attributions as the organising principle of citizenship and right distribution. In fact, any non-singularist solution could be defensible on a human rights ground if only sufficient mechanisms for the protection of basic rights are build into the system.”

Notably (294) the Israeli control system is a mixed system of normative principles of political organisation, depending on demographic and territorial references.

3.1.2 Demos

The political subsystems regarding *who* constitute the demos is being illustrated in a model showing the demographic complexities of the Israeli-Palestinian conflict:

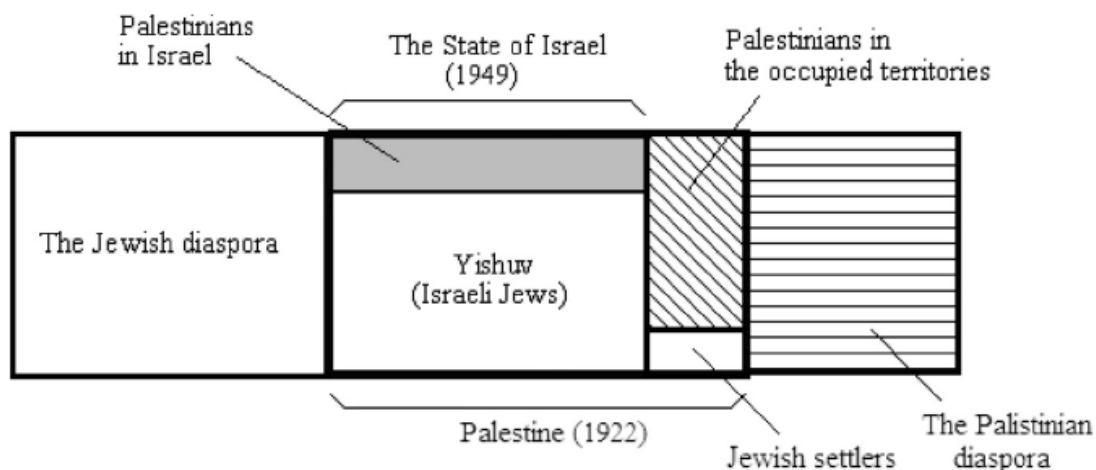


Fig. 2. Alternative demographic foundations for claims of self-determination in Palestine.(Ibid: 294)¹⁰

Butenschøn (ibid: 295-296) list 5 partly “*overlapping and intertwined politico-demographic subsystems*, characterised by different organising or constitutional

principles. In the scope of my research the interest is not the facilitation of models, rather to show how the different constitutional principles are distributed to the different elements of the demos in the state territory, mandate Palestine. a) “World Jewry”, comprising of all Jews outside Israel, inside of Israel and in the OPT. The conception of Jews as one nation indicate the organising principle of a “melting-pot”, assimilating the various parts of the nation into a common unified political community, the Jewish state. b) The *Yishuv*, compromise of the Israeli Jewish society within the state of Israel – including the settlers in OPT. Israel is a unitary state, but has deep internal politico-cultural cleavages. The *Yishuv* is organised in semi-autonomous cultural and political institutions on the basis of pluralism, but without a formal system of power-sharing at the centre. c) The Israeli Control System, which is the most relevant in my research, includes the demos of Israel and in the OPT: The *Yishuv*, Israeli Palestinians and Palestinians in the OPT. The main factor in the logic and operational codes of this system is the overriding purpose of the State of Israel to secure Jewish supremacy in the Jewish state. The means used to ensure this purpose varies from mechanisms through defence and control; keeping Israeli military supremacy to possible anti-Israeli war coalitions in the region¹¹, preventing the Palestinian refugees from returning to their places of origin in Israel; preventing the Palestinians in the OPT from acquiring the capacity to threaten the security of Israel and / or Jewish nationalist territorial claims in these territories; and preventing the Palestinians in Israel from disloyal behaviour even though they are not treated as equal citizens. There are two Palestinian subsystems; d) The Palestinian Interim Self-Government Authority (PA) compromising of the Palestinians in the OPT established after the Oslo Agreements. This implies a strategy for a gradual Palestinian political system-formation in the OPT transferring authority from the occupying power to the PA. The process has not reached an end, as the borders and Palestinian entity is yet undecided. e) The Palestine Liberation Organisation, compromising the Palestinian people, the refugees, the Palestinians in the OPT and Palestinians in Israel.

¹⁰ Butenschøn note that the relative size of the elements in the figure should not be taken to reflect accurately the relative size of the groups they denote.

¹¹ See 3.4 for a theoretical and explanatory security approach to Israel’s security situation.

The Israeli Supreme Court is the Court of the Yishuv, the Israeli Palestinians , and as High Court of Justice which exercise judicial review of the governmental actions and actions by Israeli citizens in the OPT. The obvious point here, is that the Supreme Court, as the highest Court of the Jewish and democratic state of Israel, derive from and is an integrated the Jewish political subsystem of the Yishuv, as well as parts of the Palestinian political subsystems; the Israeli Palestinians, and exercise judicial review over the OPT, as the Palestinians in the OPT can deliver petitions to the HCJ. The idea of the ISC as an independent reviewer of the lawfulness of governmental actions in the OPT can on this basis be questioned.

3.1.3 Two-Track Political System

Furthermore Butenschøn (ibid: 296-299) discuss the idea of the Zionist state-idea and ask if Israel is a Jewish state, a state for Jews or an Israeli state. Due to the lack of a constitution, the initial problem before the first Knesset in 1949 has not yet been irreversible and conclusive decided upon the fundamental question of who are the legitimate demos in the state of Israel. The options were to create a Zionist state, with sub options of a secular state of the Jews or a Jewish state (theocracy), or to include the Palestinians within its territory into the legitimate demos by either become a state based on the Yishuv as a national political community in its own or a bi-national Israeli state. The adoption of a formal written constitution was postponed indefinitely and decided to allow for its gradual creation through Basic Laws. Butenschøn argues that this has led to laws that “has created a two-track political system, one based on Zionist ethno-nationalism” where the state of Israel has been the instrument of Zionism’s solution of the “Jewish problem” and another based on a “republican conception of the State of Israel a territorial state with Israeli citizenship as a defining criterion”(ibid:298). The constitutional character of such a mixed system needs to be empirically examined, but there are laws granting ethno-nationalist rights like the often mentioned Law of Return (1950), which give any Jew the right to immigration and settlement in Israel; Nationality Law (1952) granting any person qualified as a Jew under the Law of Return citizenship in Israel; World Zionist Organisation – Jewish Agency (Status) Law (1952) regulating the role of WZO as a “national

institution in Israel; Basic Law: Israel Lands (1960) reserving public lands for “Jewish purposes”. According to Shafir and Peled (in *ibid*: 298) the two Basic Laws “Freedom of Occupation” and “Human Dignity” often referred to as the constitutional revolution, the “practical import of this change, ..., *was not manifested evenly in all areas of the law. Two areas where the change was minimal or non-existent were the civil rights of non-Jews and the place of religion in public life*”.

3.1.4 A Multilayered Regime

The conflicting constitutional principles of the Israeli political system indicate a denotation of “ethnocracy” (*ibid*: 299), “*since Israel as a political organisation is based on the principle of securing the hegemony of one specific group defined according to ethnic criteria,...*”¹² Due to the earlier discussed various subsystems, Israel should be considered a multilayered regime, which the designation of the system vary depending on which of the subsystems is studied. Butenchøn suggests a conceptualisation for the Israeli political system in the figure below (*Ibid*):

Constitutional Principles	Territorial Principles		
	<i>The Unitary State</i>	<i>The Non-Unitary State</i>	<i>Separate Territories</i>
<i>Singularism</i> (The Israeli Control System)	<i>Ethnocracy</i> (Israel Proper + East Jerusalem)	<i>Imposed/dominated self rule</i> (The West Bank)	<i>Ethnic “Homeland”</i> (The Gaza Strip, post-September 2005)
<i>Pluralism</i> (<i>Yishuv</i>)	<i>Semi-consociationalism</i> (Religious and ethnic segmentation)		
<i>Universalism</i> (World Jewry)	<i>Nation-building</i> (A melting pot for diverse Jewish communities)		

Fig. 3. The State of Israel. A Multi-Layered Regime

The scope of my research deals with facts on the ground in the West Bank (separation barrier) under the constitutional principle of singularism; organised to protect the titular “self” – Israel as a Jewish state - against being assimilated into larger collectives or intruded by other “selves”- the Palestinians. The Israeli Control System

(Israel Proper and the OPT) operates as a non-unitary state with military rule, with modifications for the most Palestinian populated areas in the OPT after the Oslo Agreement in 1993 with partial autonomy for the Palestinian Authority.

3.1.5 Comments

The ISC derive its power from and is an integrated part of the Jewish political subsystem of the Yishuv, under the territorial principle of a unitary state and under the constitutional principle of pluralism which fits the description of a semi-consociationalism. Even though the ISC is the Supreme Court of a parts of the Palestinian political subsystems; the Israeli Palestinians, the function of the Court in a state as both Jewish and Democratic strengthens the argument of placing the ISC within the subsystem of the Yishuv. The exercise of judicial review over the OPT in the West Bank, under the constitutional principle of singularism and the territorial principle of a non-unitary state creates a background for further investigation of the HCJ position. The judicial review over government actions in the OPT has in a theoretical perspective a trait of a consociational democracy's attempts of solving group-based conflicts in a model of power-sharing. A clear distinction in these terms is that the ISC is an integrated part of one of the groups in the conflict, so that a power-sharing is not applicable. The exercised judicial control of the military authorities power and the liberal rhetoric of the Supreme Court¹³ creates a potential of institutionalising any possible injustices in the governmental actions in the OPT and creating a "façade of legitimacy" as much as *de facto* protection of Palestinian rights.

3.2 Approach II: Jurisdiction in a Settler – Immigrant Society

Originating as a settler-immigrant society into a populous area, the conflict between the Jewish people and the Palestinians the area has been a center of instability and conflict even decades before the independence in 1948. Baruch Kimmerling states in his article "Jurisdiction in a Settler-Immigrant Society. The "Jewish and Democratic State" (2002: 1122), that the active immigration process has not ended; rather an ongoing expansion and settlement process is the reality. This is an argument hard to

¹² The term "ethnic" here is in the meaning of cultural / religious, and not racial – as the Jewish people are genetically of a varied origin, European; Middle East, Northern African, etc.

object; the number of settlers in the West Bank and Gaza strip has since, and in spite of, the Oslo agreements doubled.

Baruch Kimmerling focuses on both the legislative and judicial levels (ibid: 1119), “as they reflect the Israeli state’s policy toward minority groups more than any other sphere”. I will limit his arguments to the Palestinians residing in the OPT, according to my scope of research. Not to include all the boundaries within his conceptual framework would lessen the understanding of the construction and distribution of rights within the Israeli legal system and legislature.

3.2.1 The four boundaries

Kimmerling (ibid: 1122-1123) argues that Israel presently lacks a finalized border, from both a geopolitical and social perspective. “*Despite the tremendously fast and constant transformation that the Israeli state is undergoing, its fundamental attribute, that of being a settler-society that must expand and consolidate itself within a given territory, has remained intuitively and culturally constant.*” The one phenomenon in particular can illuminate Israel’s sociopolitical and cultural arena: the state’s multiple, yet simultaneously invoked – to be just and right, social and political boundaries. This allows Israel, “*in its multiplicity, to oscillate between them, and exhibit a “democratic façade”, that is supported by a rational-legal type of judicial system and that grants legitimacy to the regime and the state.*”

Kimmerling’s conceptual framework (ibid: 1123-1126) distinguishes between four main boundaries:

i) *The boundary of Jewish citizenship.* The Jewish citizens of the state are within this boundary and it is customary to consider Israel a “complete” and “enlightened” democracy. However, the constitutional admixture of religion and nationality makes the secular Jews, the majority within this group, subjects to a legislative and judicial system that is not based on fundamental democratic assumptions. Kimmerling argues that this is part of the legitimacy-generating role of the Supreme Court, as it has never

¹³ See subchapter 6.3.2

explicitly recognized the distinctiveness of this boundary, arguing that every citizen is equal before the law.

ii) *The boundary of Israeli citizenship.* This includes all citizens of Israel, and the tendencies in Israel are to give minorities (Arabs and others) citizen's rights equal to those enjoyed by Jews, but on an individual rather than a collective basis. Implicitly, the judicial system grants individual rights to non-Jews, but no collective rights. This is due to the assumption that, as a Jewish state, Jews are entitled to collective rights, and non-Jews only individual rights. The lack of collective rights can diminish and violate the sphere of individual rights.

iii) *The ethnic- religious boundary.* This includes everyone who is defined as belonging to the Jewish people, both in Israel and in the Diaspora. The state belongs, and with only a few reservations, to *anyone* defined as a Jew. Extra-statistic agencies, like the Jewish National Fund and the Himanuta Company (a non-Israeli organization whose purpose is land acquisition from Arabs, especially in the OPT) works actively to ensure that the land in Israel remains state land and that the territorial expansion continues also in the OPT.

iv) *The boundary of the Israeli system of control.* The Palestinian population in the occupied territories is still under Israeli control. The OPT are also, still, a big part of the economic system of the Israeli state. As long as no truly sovereign Palestinian state is established and no final settlement is reached, this is the situation. The Palestinian National Authority and Israel is now in a "shared" rule over this population, which was under direct, coercive Israeli rule for over 3 decades.

Kimmerling (ibid: 1125-1126) states that there are three separate subjects before us looking at these boundaries. Firstly, the deprivation of the universalistic state of certain of its legislative and judicial powers to the field of religion making Israel a partial theocracy. Secondly, the legalized discrimination of non-Jews (mostly Israeli Palestinians) minorities. And thirdly, Kimmerling argues that the state of Israel had expanded its boundaries beyond the limits of its legitimate authority by the retention of – the creation of a control system over - the population in the OPT. The control and

the economic inclusion of the OPT as a subsidiary economy combined with the deprivation of rights enjoyed even by its compatriot community, which dwells within the boundaries of Israeli citizenship. Furthermore, Kimmerling claims how Israel as an immigrant-settler state strives to maintain a democratic identity and image, as a source of legitimacy, and, at the same time, “satisfy its hunger for land and for the cultural code of creation of “living space”, all the while violating most universally accepted human rights and international conventions”.

3.3 Approach III: Israeli Security in the Region

Given Israel’s geographical location and the traditional enmity between the Arab states and non-governmental actors and Israel, security politics overrun most other political issues. In a previous paper “*Israeli Security Politics – A Regional Great Power with Local Problems?*”¹⁴ I have discussed the unique security situation of Israel in Barry Buzan and Ole Wæver’s Regional Security Complex Theory (RSCT) and the atypical characteristics of Israel as a regional great power and one of its main security problems: The Palestinians.

3.3.1 Regional Great Power and the Threat Picture

In a RSCT approach, the Israeli security situation can be summed up in a few points: i) Israel is in the region, but not “of the region”: there is an underlying overall enmity between Israel and the other actors in the region; ii) The deterrence in military power (historically / military capabilities with technological superiority) to the Israeli threat picture is mostly successful to state-actors after 1967, while not successful towards non-state actors like Palestinian terrorist and guerilla organizations and Hezbollah; iii) the acts of terrorism and general enmity towards Israel has created a high potential legitimacy for unilateral strong security measures against its neighbors and the Palestinians in the OPT: Israel has imposed its will on the region when it has wanted to, and “*gotten away with it*” (Butenschøn, 1992: 100). A short review of the general

¹⁴ Submitted to the Department of Political Science at the University of Oslo, March 2006. Updated version enclosed electronically on CD as “Israeli Security Politics”. The summary presented here is focusing solely on arguments relevant for the scope of my analysis. However, the Palestinian security threat to Israel is by no means disconnected from the regional security dynamics; on the contrary I have argued that it is the main core.

Israeli military doctrine with a special focus on the threat of Palestinian violent activity demonstrates these points more thoroughly.

3.3.2 Israeli Military Doctrine and the Palestinians

The basic points in the military doctrine (The Israeli Defense Forces 2006) are quite obvious and politically neutral: i) Israel cannot afford to lose a single war; ii) Defensive on the strategic level, no territorial ambitions; iii) Desire to avoid war by political means and a credible deterrent posture; iv) Preventing escalation; v) Determine the outcome of war quickly and decisively, vi) Combating terrorism, vii) Very low casualty ratio.

As for the first point, given the regional sentiments and geographical size of Israel, there is no reason to question that Israel will be wiped out if they loose a war.

The second point claims that Israel has no territorial ambition, which is a highly questionable statement as the settlement expansion has never stopped, and is in fact increasing in terms of people and in new built housing units; the building of the security fence deep into Palestinian land in the West Bank; the state expropriation in the same geographical area – making big parts *de facto* Israeli state land, the occupation of the Golan Heights and so on. Even though it is argued that these are merely measures of security, it is hard to believe that there is no political territorial ambition behind these actions.

For the third point, legitimacy is again in focus. The lack of recognition of Arafat and Hamas as a partner after the failure of the peace process; Ariel Sharon's unilateral disengagement plan for the Gaza settlements and the necessity of US pressure to involve in negotiations serves as examples. As Giora Eiland, Head of Israel's National Security Council, puts it in his article "Managing the Conflict: The Next Stage" (2006: para. 2): "*The message Israel has sent over the past thirty-eight years to the Palestinians and to the rest of the world, particularly the Arab world, is that it is the party responsible for dealing with and solving the Palestinian problem. Israel will proceed without any external assistance - certainly without intervention*". The

deterrent ambition is obviously effective on state level¹⁵ – yet, it does not solve the Israeli problem of terrorism acts.

The fourth and fifth points reflect the special character of Israel as not an integrated part, an “alien”, in the region. In a war scenario, Israel would not be helped by any states in the region, and have a great interest of limiting numbers of Arab states that engage them. Ending the war quickly is a mean to prevent escalation. Decisive force and the military success of Israel in previous wars *do* deter on state level, while decisive force in the OPT has proven to escalate acts of violence rather than deter.

The sixth point of combating terrorism is indeed the most complex goal of Israeli security policy. As shown through the mentioned paper, the present *fundamental security threats to Israel is terrorist groups or guerrilla like-groups* that attack Israel civilians as suicide bombers inside of Israel, fire at control posts, military camps, against settlements and settlers driving on one of almost 30 bypass roads that cross and split up the West Bank, Qassam rocket attacks from the OPT and Southern Lebanon and so on. The last point; very low casualty ratio; display the seriousness of these threats: During the last intifada from 30th of September 2000 till 28th of September 2006, 1,123 Israelis has been killed (IMFA, 2006a) and a total of 4,272 Palestinians (Palestinian Red Crescent 2006). The wave of attacks on military infrastructure and settlements and settlers in the OPT and suicide attacks directed against civilians within the borders of Israel after the outbreak of the second intifada prompted the politicians of Israel to action against its main security threat: The Palestinians. A total loss of over a thousand Israelis, mostly civilians, is in Israeli politics unbearable.

¹⁵ See enclosed paper “*Israeli Security Politics*” chapter 3.2

4 The Object in Question: The Separation Barrier

The construction which by me is referred to as the separation barrier got several other denotations which have political values connected to them. The important factor is not necessarily what the barrier is built of, but the implications of it. I have chosen to use the term separation barrier (or simply barrier), as I consider it the most neutral term. When citing and referring to other sources, I use the term that the author has used, as an indicator on political stand.

4.1 The Al-Aqsa Intifada and Israeli Response

The second intifada is often mentioned as the Al-Aqsa Intifada as it is commonly viewed that Ariel Sharon's visit to the Muslim holy place of the Temple Mount or Al-Haram Al-Sharif Mosque at the 28th of September started the Palestinian uprising. Violence escalated after this incident and the Likud Party experienced a landslide in the 2002 February elections.

According to Ingdal and Simonsen (2005, 83-90) the idea of the Israeli need to barrier to protect its citizens is not new; the revisionist Vladimir Jabotinsky formulated an ideological principle of an “Iron Wall” of how Israel as a new founded state should create a common and unbreakable front. According to Israeli intellectuals like Avi Shlaim and Jeff Halper the politics of Likud and Ariel Sharon is inspired by Jabotinsky and Halper claims that the building of the separation barrier decided by the coalition government of 2001 was meant to crush the hope of Palestinians as a sovereign viable state and represented a united frontier in Israel and Zionism. The Labour Party did however suggest building a separation barrier after the suicide attacks inside of Israel in 1995, yet it was a combination of the intifada and the public political pressure for the government to find a solution that made it reality. The spokesman of Sharon, Raanan Gissin, claims that the link between Jabotinsky’s “Iron Wall” is not applicable as this was an intellectual concept, while the security fence is to calm the conflict as a temporary measure when everything else has been tried.

The government of Israel decided on June 23, 2002 to erect a separation barrier. The decision was according to Brom and Shapir (2002: 2) preceded by an intense

discussion on the erection and the route of the barrier: Should it include most settlements in the West Bank, and dismantle the rest not annexed by the fence or mostly follow the Green Line and leave the settlements east of it intact? Unlike what may be perceived in international public opinion, Ariel Sharon and many Likud politicians resisted the idea of any barrier at all. The two main reasons for that was that a fence deeply conveyed with the political message that Israel is willing to a line close to the pre-1967 Green Line as its future border with a Palestinian state and that a fence implicitly would manifest a willingness to leave the settlers to their own fate. The public and political pressure and lack of finding alternatives resulted in a barrier which route cut deeply into the West Bank and enclosed most of the settlements there.

4.2 Security Reasoning and Criticism of it

According to the Israeli Ministry of Defense (IMOD: 2006) security fence webpage, the threat Israel is faced with requires a multi-layered response, in which the construction of the “anti-terrorist security fence” is one: Continued terrorist attacks including shootings, explosive charges, booby rigged vehicles and suicide bombers, smuggling of weapons, explosive and explosive charges into Israel and initiation of violent acts and terrorist activity through the assimilation into the local Arab population. The principle of the operational concept of the security fence are: i) Prevention of terror and weapons emanating from Judea and Samaria¹⁶ into Israel; ii) Prevention and thwarting of uncontrolled passage of pedestrians, cars and cargo from Judea and Samaria into Israel; iii) minimizing transfer of weapons from Israel to the areas controlled by the Palestinian Authority; iv) Prevention of effective shooting against Israeli population and vital infrastructure installations and v) law enforcement. These objectives does notably not include that the barrier is built into the West Bank around most of the settlements. The Israeli Human Rights organization B’tselem is one of numerous NGOs that object to the separation barrier and the intentions behind it. In a statement (B’tselem 2006) they claim that the overall features and the considerations led to the determination of the route “*gives the impression that Israel*

¹⁶ Judea and Samaria are the biblical names for the West Bank.

once again [are] relying on security arguments to unilaterally establish facts on the ground that will affect any future agreement between Israel and the Palestinians.”

A report from Israel Security Agency (“*Four Years of Conflict*” 2004: 6-7) display the drastic decrease in killed and injured Israelis in attacks out of the West Bank after the implementation of the separation barrier. In the period from September 2001 – July 2002 173 Israelis were killed and 966 injured, after the initial construction of the fence – August 2002 till July 2003 - the respective numbers were 68 and 415. The next period – August 2003 till August 2004, 28 were killed and 81 injured.

4.3 The Type of and the Route of the Barrier

The IMOD states that the security fence (ibid) provides a response to the operational assignment requiring continuity.¹⁷ The object has been to create an area that enables command and control through the usage of observation systems as well as provision of space for pursuit after suspect. Claims from the government (ibid) are that every effort has been made, to avoid including any Palestinian villages in the area of the separation barrier and that it does not annex territories to the State of Israel, nor will it change the status of the residents of these areas. According to Shlomo Brom (2004: 2) approximately 6 % of the separation barrier is a concrete wall, between 6 and 8 meters high, mostly erected in densely populated areas, as in the Eastern Jerusalem area and locations close to the Israeli highway system, while the rest is a fence; barbed wire, trench, patrol paths and a three meter high intrusion detection fence and various means for observation.

The following numbers about the barrier and its effect from B’tselem¹⁸ (2006) relate to the completion of the plan adopted by the Israeli government on 30th of April 2006. The completed construction in April 2006 was 362 km, 88 km. was under construction, while 253 km was not begun. The IMOD’s (2006) number for

¹⁷ The revised route of the separation barrier is enclosed electronically on CD “MODbarrier_apr06” – also to be found on the Israeli Ministry of Defense webpages for the separation barrier: <http://www.securityfence.mod.gov.il>. It should be noted that the revised route was a direct consequence of the judicial review of the HCJ. The physical qualities of the Barrier are also presented at the webpage. As maps in the Israeli – Palestinian context indeed are highly political, a map of the route updated in September 2006 from B’tselem is also enclosed as “Btselem_barrier0706” on CD, and can also be found at http://www.btselem.org/Download/Separation_Barrier_Map_Eng.pdf. For map from the Palestinian side, see “wall.pdf” from <http://www.stopthewall.org>, which highlight the complete control system of the West Bank and the barrier.

completed construction, as to 25th of April 2006, was some smaller 335, as it included only completed construction that was operable. The area of the West Bank that was located west of the was 479,880 dunams¹⁹, which is 8,5% of the West Bank. Another 191,040 dunams equal to 3,4 % of the West Bank east of the barrier are completely or partially surrounded, leaving 11,9 % of the West Bank affected. A total of 60 settlements (including the settlement blocs surrounding East Jerusalem) with a population of 380,758 are west of the barrier, while 69 settlements with a population of 57,330 are east of the barrier. The numbers gives reasoning for the heavy criticism of the route of the separation barrier. As we will see in chapter 6, the legality of settlements in the West Bank was for a long time not touched by the ISC. A separation barrier built into the West Bank follow the logic to protect Israeli citizens, regardless of their location.

4.4 Consequences for Palestinian Human Rights and Daily Life

The military authorities (IMOD 2006) claim to have applied the concept of minimum disruption when planning the route of the separation barrier. This means that they have taken the daily life of the populations residing on both sides of the Security Fence along its course into consideration. The concept is manifested in several forms: Narrow agricultural passageways, dozens of which will be located along the route to enable farmers to continue cultivating their lands; passage for pedestrians and vehicles, at which inspections will take place to maintain security and crossing points, for transfer of goods across the central area and in the Jerusalem region.

B'tselem (2006) indicates the great impact of the separation barrier on Palestinian daily life and the rights of work, education, medical attention and freedom of movement. 17 communities with a population of 27,520 Palestinians are located west of the barrier. These will require permits to live in their homes, and only be able to leave their communities via a gate in the barrier. 54 communities, with a population of 247,800, east of the barrier are completely or partially surrounded by the barrier, as well as 21 communities in East Jerusalem, with a population of 222,500 is affected by

¹⁸ B'tselem is an active Israeli information centre for human rights in the occupied territories.

¹⁹ A dunam is equal to 1 square kilometre.

the barrier of the route. The estimation of total Palestinians affected by the barrier's route is 497,820. Furthermore, B'tselem (ibid) presents a picture of "minimum disruption" that does not fit the concept of the IMOD. The numbers and "opening hours" of the gates limit the freedom of movement and hence the ability to work, receive medical attention and education severely.

The Report of UN special rapporteur John Dugard (Commission on Human Rights 2003) deals with several of the human rights violations of the barrier. The report highlights that the building of the separation "wall" is *another* security mean in the OPT that violate Palestinian human rights on a broad scale. The effect of the barrier in addition to the control matrix already existing under occupation are restraint of movement of goods and person which give rise to unemployment, poverty, poor health care and interrupted education and they result in a humiliation of the Palestinian people.

Shlomo Brom (2004) deals with the political and public relations costs of the security fence²⁰. He claims that the intentional purpose of the barrier was purely defensive, yet the manner of implementation is the explanation of why it has become so controversial: i) the route of the barrier has become far longer and far more tortuous; ii) it has a materially adverse effect on the daily routine of hundreds of Palestinians; iii) world opinion has concluded that this is a political action, rather than a security measure. The political costs are mainly that Israel acquires a "*terrible image worldwide as a racist state that pens hundreds of thousand of Palestinians in enclosures, seizes their land, and makes their lives unbearably difficult.*". To deal with these problems he suggests that the eastern fence should be abandoned, as it is a "*political and public relations catastrophe*", limiting the use of depth-providing barrier, that pens Palestinian settlements into enclosed areas" and to look for other operational alternatives to the problems they seek to resolve, and finally limiting cases where the barrier divides Palestinian villagers from their land and Palestinians from their essential social services.

²⁰ Brom is not consistent in his denotation of the separation barrier.

4.5 Comments

The complexity of topics in regard of the separation barrier could indeed be examined more thoroughly. I refer to chapter 7.1 to show the legal procedures for the Palestinian local inhabitation to petition against barrier. However, the main point of this brief discussion has been to show that even though conflicting arguments disagree on purpose, intentions and effects of the barrier, they all reflect parts of the truth: The unilateral action of erecting a separation barrier *is* an effective measure to constrain terrorism, at the same time it has qualities of a “land grab” of Palestinian land and it does have serious and large-scale consequences for the Palestinian population of the West Bank. The link between the settlements and the route of the barrier is thoroughly displayed both in numbers above and attached maps. The question before us is how the HCJ views these different aspects of the barrier in its review of legality of it and weighing the following security benefits and humanitarian consequences in the *Beit Sourik* case.

5 The ISC and the Israeli Legal System

When the laws in force derive from more than one legal tradition, it is usually denoted as mixed legal system. The codification in the Israeli legal system is basically a civil law tradition, yet the law system is closer to the common law system with judge-made law and the rule of precedents. The judicial system has a pyramidal structure: the Supreme Court bind any Court but itself. As Aharon Barak (2002: point 3) points out, the family of mixed jurisdiction legal systems lacks a common history and not much research has been done on their common behavior. However, some characteristic traits in the Israeli legal system should be noted in this thesis' context.

5.1.1 Legal Duality – Secular and Religious Courts and Laws

According to Barak (ibid: point 2) the basic approach of the Israel's legal system is western democratic. It's secular, liberal and rational. The religious laws – Jewish, Moslem, Druze and Christian – is positive law. This means that its legal force comes from the secular legislator with limited scope. Kimmerling (2002: 1123-1125) says this is an expression of Israel as a partial theocracy. The boundary of Jewish citizenship in Israel gives a constitutional admixture of religion and nationality, the nonreligious members of this collectivity, are subject to a legislative and judicial system that not based on fundamental democratic assumptions. Kimmerling claims that this is (ibid: 1125), *“facilitating the delineation of its collective identity and the criteria for membership within it according to non-civic criteria. From this perspective, the state is not simple Jewish, but Jewish- Orthodox, ..., [making] Israel a partial theocracy, a definition that cannot be reconciled with any denotation of liberal democracy.”* As shown in 3.1, Butenschøn (2006: 298) denote this trait as a two-track political system, one giving ethno-nationalist rights connected to being Jewish and another on a republican territorial state with Israeli state as criterion of rights.

5.2 The ISC and High Court of Justice Functions and Mandate

The Supreme Court has its seat in Jerusalem and as an appellate Court, the Supreme Court considers cases on appeal on judgments and other decisions of the District

Courts. Kretzmer (2002: 10-12) explains that the HCJ is a remnant of the British Mandatory, where the Supreme Court was given the jurisdiction to issue prerogative writs against government agencies. As most of the British Mandatory legislation was left intact when the independent State of Israel was founded the dual function as the final Court of appeal and as a Court of first, and last, instance in petitions to the “High Court of Justice“ was retained. The Israeli statute, the Courts Law of 1957, which replaced the British Mandatory legislation, maintained the existing structure.

As HCJ, the ISC rules as a Court of first and last instance, primarily in matters regarding the legality of decisions of State authorities: Government decisions, those of local authorities and other bodies and persons performing public functions under the law. In Basic Law: The Judiciary, paragraph 15 (c) (The State of Israel 2006) the Court is granted power to rule on matters in which it considers necessary to “*grant a remedy for the sake of justice and which are not within the jurisdiction of another Court or tribunal.*” In the context of the judicial annexation of the OPT, the paragraph 15 (d) (2) is of interest. It states that the Court has the power “*to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if the were improperly elected or appointed to refrain from acting*”. The mandate is comparatively wide and the basis of the self-imposed judicial review or “annexation” of Israeli governmental actions in the OPT (Kretzmer 2002: 11).

5.3 Judicial Independence

The number of justices on the Supreme Court is fixed by Knesset resolution and is, of October 2006, 12. The most senior justice is by convention, the president of the Court and the second senior justice is deputy president. Judges are appointed by the President of the State upon election by a Judges’ Election Committee which consists of nine members. The Minister of Justice is the chairman of the committee, where four members are political: Two ministers from the government and two members of Knesset, elected by the parliament itself. The rest of the members are judges: The president and two other judges of the Supreme Court and two representatives of the

Chamber of Advocates elected by the National Council of the Chamber (Basic Law: The Judiciary: paragraph 4(a)).

Kretzmer (2002: 11-12) points out that a series of institutional arrangements are made to protect the judicial independence and places serious constraints on pro-governmental position appointments, pressure of judges to follow a certain political line or to decide cases in a manner convenient for the government. The abovementioned composition of Judges' Selection Committee, appointment to serve until mandatory retirement age of 70, that they can not be removed from their posts unless a disciplinary Court of their peers convicts them of a disciplinary offence or the Selection Committee, by a majority of at least 7 of its 9 members, decides to remove them from their post. The absence of a formal constitution does grant Knesset the power to amend provisions that protect judicial independence. Even though this is highly unlikely to happen, the jurisdiction of the Court is also defined in a Knesset statute and it is not impossible that the Knesset could react to an over-activist Court. Kretzmer (ibid: 89) illustrate that the political discussion after the *Elon Moreh* case²¹, where the Court made a controversial decision that requisition of land for a Jewish settlement in the OPT had been illegal and that the land should be returned to its Arab owners, show that there is a chance for such a reaction from the Knesset. "*There were even calls to ignore the decision or to legislate so as to undo its effects*" (ibid). Kretzmer (ibid:12) argues that the chance of a governmental reaction to Supreme Court decisions that it finds politically unacceptable by initiating legislation to curbs the institutional independence of the Court is negligible, while the chance of it initiating legislation that would alter the Court's jurisdiction cannot be ruled out.

5.3.1 The Supreme Court and Public Opinion

The factor of public opinion on Supreme Court rulings should not be left out. As Barak state (2002: point 8.2) the judge has neither sword nor purse, all it has is the public's confidence in the Court. The ISC prestige in the Israeli public is close to the IDF, and is by far the branch of government that enjoys the widest public support.

²¹ *Dwaikat v. Government of Israel* (1979) 34 (1) PD 1.

The most recent Peace Index, a project of the Tami Steinmetz Center for Peace Research Center at the Tel Aviv University (2006), shows that in the aftermath of the Lebanese – Israeli war the IDF, the Supreme Court and the Knesset all experienced a fall in public opinion, HCJ declining from 62.5 to 48 on an efficiency scale from 0 (“not efficient at all”) -100 “very efficient” on efficiency. A study from 1994 (Barzilai, G, Yuchtman- Yaar, E. and Segal, Z. “*The Israeli Supreme Court and the Israeli Public*”, in Kretzmer 2002: 12-13) shows that “*the more the declared matter of the High Court decision involves imposing civilian supervision over the security authorities, the more the support for the Court diminishes and reservation increases. This is especially the case when the declared matter involves imposing civilian judicial review over the activities of the security authorities and the army in the territories*”. Barak (2002: point 8.2) discuss the link between objectivity and the Court’s relation to the public. A judge should reflect the basic values of the democratic society in which he lives, and give effect to basic values even when it does not correspond to “shifting winds” in public opinion. The need to ensure confidence does however not mean to guarantee popularity.

The Israeli Supreme Court *could* be constrained by public opinion, although the ISC has, as we have seen and will see in the following chapters, made controversial rulings concerning the actions of the security authorities in the OPT. Kretzmer (ibid: 13) state that the public image of the Court is one of a body that is politically neutral and “*adheres strictly to principles of procedural justice, examining every argument placed before it solely on its merits, without discrimination.*”

5.4 Basic Laws and Constitutional Process

In the state of Israel the human rights are defined in Basic Laws. These laws have traditionally been commonly referred to as a constitution like in other democracies, yet even though they have constitutional traits, they are not gathered *in one* constitution. According to Barak (2002: point 1) the implementation of the two Basic Laws: Human Dignity and Liberty, and Freedom of Occupation as a codification of Israel’s “Bill of Rights” and codification of civil law mean that Israel is building a constitution. The Basic Laws were given a *lex superior* status (ibid); “*in spite that*

there is no supremacy clauses in the Basic Laws, and against a line of cases that provided that until the unification of the Basic Laws, the Basic Laws should be viewed as regular statutes.” The activist approach that has made the ISC well known also outside the borders of Israel has had great impact on liberalization of rights when ruling controversially and courageously concerning women rights in the religious and professional spheres, as well of the equal rights of sexual minorities.

The constitutional process did not happen over night. Before these rights were defined in the two Basic Laws, the Court looked to accepted standards in other democratic countries and in international documents to define which rights were to be recognized. These recognized rights includes the freedom of speech, the right to equality, freedom of association, the right to bodily integrity, and freedom of religion. The Court has adopted interpretations of statutes that made them “more compatible with fundamental rights and invalidated delegated legislation that placed restrictions on individual rights without clear statutory authority” (Kretzmer, 2002: 13-14).

Joshua Segev (2006: 102) interprets the changing role of the Supreme Court in light of two models of judicial review. He is initially skeptical to the claim of a decline in formalism and a rise of values in the view of the constitutional process, as it ignores “the fact that Israeli constitutional law is an exception to the overall trend, [and it] prevents us, in my opinion, from acknowledging the normative dilemma faced by the Israeli Supreme Court judges.”

In The Limited Arbitrator Model (ibid: 147) for judicial decision-making, the role of a constitutional court is mainly to resolve disputes and by that promoting justice. The model argues that not all disputes needs to be sanctioned, but it does not mean that the model has an antagonistic attitude towards the promotion of justice. The model argues that a constitutional court operates as part of a larger democratic enterprise and by that requires focus on the resolution of specific disputes. The court use moral and political principles “pragmatically, circumstantially and in the context of the specific *parties to the disputes and the specific constitutional arrangement present in a given democratic community*”.

The Moral Shepherd Model (ibid: 139) points out the main role of a constitutional court to advance justice, fair cooperation, integrity, democracy and other moral and political ideas. The model acknowledge the function of the court as a forum to resolve disputes as in The Limited Arbitrator Model, but this function is secondary to the promotion of moral and political ideas. Hence, the court should decide, also in difficult cases, according to principles and not on pragmatic, accidental or circumstantial bases. The model does not rely on the view that the judges simply have to rely upon their unconstrained moral views in justifying decisions. Their moral views have to be embedded in a legal and political theory that gives direction to when they may be used to resolve constitutional disputes.

When normative models or theories are applied to the political realities they are usually most useful when viewed as complementary. Indeed, the two models provide two different starting points on how a constitutional court exercises its judicial review. The essential point here is that the two models would complete the picture of how the Court views its function, and in the context of the ISC and the OPT, more importantly: Facing the question of the legality of security measures taken by the military authorities; When does it refer to overall principles and when does it take the stand of case-to-case pragmatism in justiciability and balancing contradictable values?

Kretzmer (2002:14-16) contextualize the Judicial activism of the ISC relating to the OPT by stating that the main area that the area where in which the influence of rights-minded jurisprudence has been limited is that of security powers. The Court avoids interfering in political questions unless the question at hand was essential to determine the legality of governmental action that deprived and individual of his or her rights or liberties. The Court has during the last years handed down a number of courageous rulings supportive of human rights. Kretzmer mention the ruling of forbidding security services using physical force in interrogation of terrorist suspects²², the ruling which deny the authorities the power to use the law on administrative detention to hold detainees as “bargaining chips,”²³ and deeming

²² *Public Committee Against Torture in Israel v. Government of Israel* (1999) (3) Takdin-Elyon 458.

²³ *Plonim v. Minister of Defense* (1997) 44 (1) PD 721.

unlawful restrictions on Arabs purchasing houses in a communal settlement established on state land by the Jewish Agency.²⁴

5.4.1 Criticism of Constitutional Process

Kimmerling state that the activism within the “Jewish Boundary” contrasts the judicial restraints the HCJ imposes on itself regarding the rights of Palestinians in Israel and in the OPT.

The HCJ establishment of its unofficial role as “constitutional Court” was its own interpretation of how the Court should function. This leads to the impression that the HCJ is an “impartial and autonomous body that acts according to universal criteria and some internal logic and that is disconnected form the interests of the state’s ruling factions.” (ibid, p.1127) Also, The Basic Law: Human Dignity and Freedom, gives the Court the power to review statues that were enacted after its implementation, and by doing so, this law perpetuated all of the previously existing discriminatory laws (ibid, reference 14, p. 1128).

As a following consequence of this, he (ibid, p.1139) argues that; (with referral to Ruth Gavison²⁵ who opposes a continuous legislation of additional Basic Laws) “*given the internal political power relations of the Israeli state, additional Basic Laws will only strengthen the status quo... [ensuring] the continuous granting of emergency authority to the military and the various “security agencies” as well as the protracted absence of civil equality in the state*”. Kimmerling argues that these two Basic Laws serve to reproduce the existing power structure and social order. Israel, as a Jewish and democratic state, is viewed by the legislative and judicial system to be two different operational mechanisms in Israeli society: “democracy ... as “procedures” (i.e., free election), whereas “Jewishness” is regarded as an identity, an overall cultural operational code and organizational principle (ibid).

This criticism is one that the Supreme Court is aware of and Barak (2002: point 8.1) state that neutrality is not to be indifferent with to democracy, the separation of

²⁴ *Kaadan v. Israel Lands Administration* (1995) 44 (1) PD 264.

²⁵ Professor Gavison is among others a senior fellow at the Israel Democracy Institute and a professor of Human Rights at the Hebrew University in Jerusalem and was elected as member of the International Commission of Jurists in 2003.

powers, judicial independence or human rights. “*Neutrality means fairness, and impartiality*” (ibid). The judges are evidently an integral part of the Israeli Political system, yet this does not mean that they follow the logic of the other branches; this is the nature of the balance of powers. Barak (ibid: point 8) underline this tension between the Supreme Court and the other branches of government and the public. He points out that the Court is accused of being a nondemocratic body, imposing their will on people. Barak (ibid) claims that it would be a tragedy if the Courts were representative bodies, based on the notion that they should give effect to the deep values of their society and not the “mood of the day”..In the role of protecting human rights in a free and democratic society, they should not defer to the other branches when it comes to balancing between the competing constitutional values.

The criticism of the ISC by Baruch Kimmerling (ibid: 1128) can by no means be said to be modest. He accuse the Israeli Judiciary to help and protect (instead of reviewing and controlling) the government “regarding its Arab subjects and does not protect civil and human rights” and also “constitutes one of the most sophisticated tools of repression employed since the State of Israel was brought into being.”

How can two respected authorities within their fields come to so different conclusions on the same matter? One explanation is their positions, one as (former) president of the HCJ and the other disconnected from the responsibility such a position embodies. Another is the different academic branches, Barak as an expert of law, and Kimmerling as a professor in sociology. As shown, Barak is concerned with the sociological aspects of the HCJ, yet Kimmerling’s approach is clearly more political sociological. As a political scientist, my approach is trying to combine these approaches to understand the claims of both. Hence, Kimmerlings (ibid: 1128) statement that the HCJ and the judiciary is an “*integral part of settler-immigrant society, which maintains its own logic and interests and which must maintain for itself a territorial living space*” is of a clear interest in the following discussion. His arguments are built on upon a value-oriented axiom with the basic assumption of a Court, and the HCJ in particular, to extend assistance and protection to minorities and

to the politically, socially, economically, or otherwise deprived within the structure of the law and its interpretation. Following this normative deliberative democracy argument, he states (ibid: 1129) that there is no more sensitive litmus test to exhibit the character of the Israeli government than “*areas in which the HCJ has intervened, or not, and the ensuing consequences..*”

5.5 Principles in the Work of the Supreme Court

The Supreme Court is active in making law, and substance not form is its message. According to Barak (ibid) the tool of this is teleological interpretation: “We do not ask what the intention of Parliament was when drafting a statute; we ask what the purpose of the statute is... We created interpretive presumption, by which we presume that the purpose of every statute is to further the basic values of the Israel legal system.” Following these techniques, a whole range of human rights have been created – and “we do have a very sophisticated network of common law human rights.” The concepts of reasonableness (from common law tradition), proportionality (from the continental systems) and fairness (from both) as tools of social engineering (Barak: 2002, point 8).

In every society there is at all times competing values. The HCJ approach to deal with this in the legal system is a multiple concept of weighing and balancing (ibid): “*ad-hoc balancing and principled balancing, horizontal balancing and vertical balancing, etc. As balancing is connected with the problem of weighing the different values, we have developed theories of weighing values and of balancing them at the point of conflict.*” This brief discussion of the HCJ has given a peek ahead to what to look for in the HCJ’s judicial review over the OPT.

6 Pre - Analysis

6.1 Operational Set - The Central Term of Legitimacy: Impartiality

As the citation from Ronen Shamir in the introduction display; the central source of legitimacy is impartiality. As this thesis has the character of a test of criticism, a set of questions are made to reveal possible patterns that shed light to the critical arguments are essential to create a meaningful tool of analysis to be applied to the *Beit Sourik* ruling.

- i) Is it possible for the HCJ to be impartial, when it is an integral part of one of the conflicting parties, in its exercise of judicial review over the military authorities in its function of occupying in order to contain the security threats from the other party?
- ii) More importantly; does it claim to be so?
- iii) Is consistency displayed in the Court's approach in rulings in matters that share the same merits?
 - a. Is the theoretical application of IL in interpretation the same?
 - b. If the approach varies, what is the reasoning of such?
- iv) Has the HCJ in the later years shown the same degree of activism in its review over the OPT as it has done within "the Jewish boundary"?
- v) Implementing the concept of balancing competing values, what is the trend of the weighing of these? Is preference given to one or the other in a substantial way?

6.2 Judicial Annexation and International Law in the OPT

6.2.1 Jurisdiction

Kretzmer (2002: 19-20) points out that the ISC is not an international forum; it's placed on top of the hierarchy of the judicial branch of Israel's institutions of government. There is a precedent for military commanders in occupied territory to not be subjects of the jurisdiction of the courts in their home country. It is *not* self-evident that the HCJ's scope of review extends to actions carried out by the military in areas not part of the Israeli sovereign territory and in which the Israeli legal system does not apply. When the first petition from residents of the OPT reached the HCJ, the government's legal advisors had to decide whether to contest the Court's jurisdiction

over such petitions. Meir Shamgar (in *ibid*: 20), the attorney general in the formative years of the Court's jurisdiction over the OPT, has written that the basic idea was to ensure some form of external control over the actions of the military so as to prevent arbitrariness and maintain the rule of law.

Kretzmer (*ibid*) assume that another reason could be the notion that the petitions of the residents of the OPT to the ISC would imply a recognition of Israel by the petitioners and a political recognition of Israeli rule over the OPT. In the decision of this first petition, the *Christian Society* case (1971), the Court itself remarkably did not refer to the matter of its own jurisdiction. In later cases, it was noted that the counsel for the respondents in the mentioned case did not contest the jurisdiction of the court to include the Israeli military commander in the area of his military rule.²⁶ Later Justice Landau noted that the authorities again had refrained from contesting the Court's jurisdiction. Furthermore, he explained that the Court therefore would assume that (*Rafiah Approach* case, 176, in *ibid*):

"Without ruling on the matter, that the jurisdiction exists on the personal level against functionaries in the military government who belongs to the executive branch of the state, as "persons fulfilling public duties according to law" and who are subject to the review of this court under section 7 (b) (2) of the Courts Law, 1957".

The tentative legal basis for this judicial annexation of Justice Landau cited above, was adopted as the authoritative view of the Court as the military commander and those acting on his behalf are public servants, *"they are subject to statutory jurisdiction of the Supreme Court, acting as High Court of Justice"* (*ibid* and *ref. ch. 5.2.*). This adopted legal basis of judicial review over the OPT has important implications, as it is not dependent on the consent of the parties or on theories of natural or international law. The military authorities could not avoid judicial review, even though they are in possession of the legislative power in the OPT, but the Knesset could redefine the Court's jurisdiction to exclude or limit review of the HCJ decisions relating to the OPT (*ibid*: 20-21). After the 1967 war, a total annexation of

²⁶ This was noted in the rulings of both the "Electricity Corporation" case, decided shortly after the "Christian Society" case and in the "Rafiah Approach case" of 1979.

the Palestinian territories would *de facto* create a binational state with a Jewish minority and grant the Palestinians residing there with full rights as citizens of Israel. Kimmerling (2002: 1137-38) points out a different aspect of the comparatively unique judicial annexation of the OPT:

“At the same time, Jewish residents and their settlements, as well as the local Jewish authorities, were subject to Israeli law and justice. This arrangement is an extremely original Israeli invention, providing a sort of personal sovereignty that accompanies each settler wherever he or she goes (...) [and] functioned as a kind of selective annexation of the territories without granting the Palestinian residents citizenship.”

6.2.2 Justiciability

In contradiction to jurisdiction, which is determined by external constraint, the justiciability of a Court involves an internal constraint of power placed by courts themselves on their own decision-making power not to encroach on the territory of other branches of government. Kretzmer (ibid: 21-25) list three main features of petitions relating to the OPT that has made the question of justiciability relevant:

a) *Governmental “Act of State” doctrine*: As most of the West Bank citizens are citizens of Jordan and the centrality of the OPT in the Israeli-Arab conflict could mean that governmental actions are “acts of state”, which is one of the classic grounds of non justiciability in the English legal system. Kretzmer (ibid:22) points out that a reason for the government to not claim that all acts of the military in the OPT as acts of state, which would have prevented substantive judicial review over those acts, would be in contradiction to the policy of accepting the jurisdiction of the HCJ. Barak (IMFA 2005: 15) explains that the Court – as the first instance for complaints against the executive branch – does not use the doctrine, but consider the case on its merits, even if *“the terrorist activities occur outside of Israel or the terrorists are detained outside of Israel”* Regardless, Kretzmer (ibid: 22) states that one of the theses of his study is that the doctrine has never been considered as grounds for dismissing a petition, the governments perceptions of acts in the OPT as acts of state, is one of the factors that can explain the Court’s reluctance in intervening.

b) *Political-Question Doctrine*: This relates mainly to cases of establishment of civilian settlements in the OPT, where the Court has distinguished between an individual's claim that his or her property was taken illegally and the legality of establishing civilian settlements in the OPT. The political sensitivity of the latter question could make it non-justiciable, but did not affect the justiciability of individual property rights. The argument has been brought up to the HCJ a number of times; in the *Beth El* case (1979) non-justiciability was claimed even though the individual claim of illegal confiscation of land was recognized. The Court was not ready to examine whether the establishment of a civilian settlement was illegal, because it would not recognize the argument of paragraph 6, of Geneva Convention IV, because it the Convention was not enforceable in Israel's domestic court.

In the *Elon Moreh* case²⁷ one year later the Justice Landau refused to accept the argument of non-justiciability made by the counsel for the authorities as the Court should refrain from dealing with a petition that challenged a government decision to requisition uncultivated land for settlement purposes. An argument based on "relativity" of the right of property was unacceptable to Justice Landau, and the military government had to show that it is acting within its legal powers (*Elon Moreh* case: 14, in *ibid*: 23); "and cannot exempt itself from judicial review by pleading non-justiciability."

In a later case²⁸, submitted by the *Peace Now* movement (in *bid*: 23-24) challenging the legality of the of the Likud government settlement policy in general, the distinction of justiciability in light of the Political-Question doctrine between a general issue of policy and expropriation of individual rights became evident. The current President of the Court, Justice Shamgar held that since it called for intervention in policy matters in the domain of another branch of government, there was no concrete dispute and the predominant nature of the issue was political.

²⁷ It should be noted that the Court's main argument for ruling against the requisition was that it was based on the ideological Zionist notion of the right of Jews to settle in the "the whole" Eretz Israel and that the security arguments in the case was a submotive. After this ruling, all requisitions for settlement purposes have been argued from a security perspective.

²⁸ *Bargil v. Government of Israel* (1991) 47 (4) PD 210

c) Standing: The authorities has refrained from using the argument of standing, that the residents of the OPT are nonresident enemy aliens, who may not bring suit before the ISC. Such an argument would have been incompatible with the policy of the authorities to accept HCJ jurisdiction over the OPT.

6.2.3 Substantive Norms

The ISC has had to consider which substantive law that was pertinent in the OPT. As IDF entered the PT in 1967, the military commander published proclaims that the prevailing law would remain in force, subject to changes made by military order or proclamation.

6.2.3.1 Israeli Administrative Law

As seen above, the Court's jurisdiction rests on the notion that the military authorities "*perform public functions under law.*" Kretzmer (ibid: 25-27) deals with the question whether this means that they are only subject to the Court's jurisdiction as a High Court of Justice or also subject to the substantive rules and principles of Israeli administrative law that apply to all branches of government. First of all, the Supreme Court, sitting as High Court of Justice, rather than a court of appeal, its main function is to examine the *legality*, rather than the *correctness* of government decisions. To do this a body of law described as Israel's common law has been created, which rests on three principles: (1) no administrative authority may perform an act, especially if that act affects the liberties of the individual, unless specifically empowered by law to do so; (2) in exercising their powers, administrative authorities are bound by rules of procedural fairness, such as the duty to afford a hearing to a person likely to be adversely affected by an administrative decision; and (3) administrative discretion must be exercised reasonable, without discrimination for a proper purpose and on the basis of relevant considerations. Kretzmer point out that the Court follow a theory of applicability that all the rules of Israeli administrative law that apply to governmental authorities acting within Israel, also apply to the military acting in the OPT. The administrative law has in general provided the Court with a potent weapon to challenge governmental decisions that meet standards of local and international law.

By extending the grounds for judicial review beyond the rules of belligerent occupation²⁹ the ISC has argued that it has gone much further in protecting the rights of the residents in the OPT than required by international law. The application of Israeli administrative law to the judicial review over military authority actions in the OPT is an internal constraint and has been emphasized by the Court when alternative grounds for overturning an act of the military exist. The political implications of such internal constraint are less than an overruling on grounds of international law.

6.2.3.2 Military Orders

Another question before the Supreme Court was to define the status of the military orders, which, under the abovementioned proclamations, can amend local law, and are such object to judicial review? When may a military commander change the local law, and may the commander promulgate legislation that has long-term effects or produces fundamental changes in the OPT? (Ibid: 27-28)

The first expressly discussion of this was during the *Rafiah Approach* case³⁰ where the majority of justices followed Justice Kister's suggestions, which also became the accepted approach of the Court. Kister argued that while a military commander in an occupied territory is in effect the source of his own power, in all his actions he is subject to orders from his superiors. In ever "enlightened country" he is also bound to comply with the rules of international law that limits his authority.

Furthermore, the Court views the legislative acts of the military commander as subject to judicial review under Israeli administrative law, as the Court regards him as a member of the Israeli public administration. In the *Hamas Deportation* case³¹ this view of the Court was expressed: "Security legislation may not effect changes in general, well-established norms of administrative law, which our law regards as principles of natural justice" and in the *Ja'amait Ascan*³² the Court stated that "This review reveals that from the legal point of view the source of the authority and power

²⁹ See Chapter 4.6.5 "Hague Convention" for powers and duties of a belligerent occupant and the ISCs approach to this in its judicial review over the OPT.

³⁰ *Khelou v. Government of Israel* 27, (1972) (2) P.D. 169

³¹ *Association for Civil Rights in Israel v. Minister of Defense*, (1999) 47 (1) PD 267

³² *Ja'amait Ascan v. IDF Commander in Judea and Samaria*, (1982) 37 (4) P.D. 785

of the military commander in an area subject to belligerent occupation lies in the rules of public international law that deal with *occupatio bellica*, and that are part of the laws of war. Kretzmer (ibid: 28-29) argue that given the view of the Court, that the powers and authority vested in the military commander derives from “the rules of public international law dealing with belligerent occupation”, it would seem that each and every act of the military should be examined to see whether it complies with these rules.” Moreover, Kretzmer state that a review of the jurisprudence of the Court reveal that the Court not consistently has carried out such an examination, but rather has done what it can to avoid resort to standards of international law in many cases. Even when the Court has been prepared to look to international law, the application and interpretation of it has often prevented it from serving as a meaningful constraint of the military.

6.2.4 Application of International Law

The HCJ adopted the approach of English law on a distinction between two sources of international law long before the occupation of the Palestinian territories (ibid: 30-32). Norms of customary law are regarded as part and parcel of the common law of the realm, and as such they are applied in domestic courts unless they are inconsistent with an act of parliament. Norms of conventional law do not automatically become part of the domestic law of the land. Courts do not enforce them unless they have been incorporated in domestic law. The two documents that describe the international law of belligerent occupation are the Regulations annexed to the Hague Convention (IV) of 1907 and the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949. The question of the Court’s view on which status has these in terms of being conventional law or customary international law, has as we will see great implications on the applicability of the Conventions to the judicial review over the authorities in the OPT.

In the following pages I will concentrate the Kretzmer’s discussion on the HCJ’s general view in spheres which is relevant in my scope of research. The discussion below will hence not be a complete discussion of every aspect of the Supreme Court’s view on international law enforcement in the OPT.

6.2.4.1 The Geneva Convention IV

The official legal arguments of the Convention's non-application to the West Bank and Gaza was in Kretzmer's view (ibid:30) the controversial interpretation of the second paragraph article 2 in the convention, stating that the convention shall apply to "*all cases of partial or total occupation of a High Contracting Party ...*" The claim is that as the West Bank and Gaza was not a territory of a "High Contracting Party" when occupied by Israel in 1967, the Convention does not apply to the Israeli occupation of these territories. Despite this, the government "*repeatedly declared its willingness to abide to the humanitarian provisions of the Convention*" (Ibid: 34) Kretzmer (ibid) states that while Israel objected to the notion of the West Bank and Gaza as occupied territories, the government never formally contested the applicability of the Hague Regulations to these areas.

The Court has never ruled on the argument regarding applicability of the Geneva Convention IV to the OPT before parts of this areas were transferred to the full or partial control of the Palestinian Authority. The Court has not accepted the argument that the Convention has become of customary international law that may be enforced in domestic courts. Neither have the arguments of enforcements of conventions of conventional law, which claim that the rationale for non-application of conventional law in the domestic courts does not apply in the case of occupied territory. The direct ruling of such territories by the executive government, which has the powers of the executive, legislative and judicial powers at hand, enforcing treaties made by that branch of government, would in no way undermine the legislative supremacy of parliament. The Court took the stand that the government's declared commitment to the humanitarian provisions of the Convention (which was viewed to have some legal force by its declaration) may be enforced, though only if the Court is of the view that justice requires its enforcement in a specific case. Kretzmer (ibid: 40-41) claims that the Judges confused two issues taking this stand:

“The government’s commitment was made to mitigate its position that the Convention does not formally apply to the West Bank and Gaza. However the problem the judges who relied on the said commitment wished to address was not the applicability, but the domestic enforcement problem. It is hard to see why the government’s declaration that the State of Israel would respect the humanitarian provisions of the Convention should have a stronger standing in domestic law than the formal legal commitment made by its ratification of the Convention.”

Even so, the Court in later cases has expressed its opinion on the Convention even though the authorities raised the non-enforceability argument. (Ibid: 42)

Kretzmer (ibid: 56-58) claims that the ISC’s approach to Geneva Convention consists of two different theories of interpretation; which reveals “a great deal about the Court’s attitude in cases relating to the Occupied Territories”. In the *Beth-El* and *Elon Moreh* cases the petitioners both challenged the legality of settlements. The Court has refused to examine whether the civilian settlements in the OPT is compatible with the final paragraph in article 49, which prohibits an occupying power to transfer parts of its own civilian population into the occupied territories. The view of non-justiciability, (as noted in 6.2.2 b), was claimed in the *El Beth* case. In the *Elon Moreh* case the Court refused to meet the state attorney request when he explicitly asked the Court to “confirm to the authorities that from the point of view of the Geneva Convention there is nothing wrong in transferring land to settlers for their settlement needs.” (*Elon Moreh* case, PD: 29, in Kretzmer 2002: 44) The Court was not willing to rule on the matter and stressed that in the failure to do so not should be taken as a support for either parties. In cases of deportation (dealt with in paragraph 49 in the Convention), the Court has had a different approach as it has dealt in detail with the argument that deportations of the type carried out by the IDF are prohibited by the Convention, even though it has refused its enforceability under the view of the prohibition as conventional international law. The two inconsistent theories of interpretation, has been adopted in interpreting different provisions in the same convention. One removes the background and drafting history and seeks to discover the meaning of a provision in a highly formalistic way; when the text of a treaty is ambiguous, one may not take into account the intention of the drafters. The other is the diametrical opposite; an interpretation that ignores the clear wording and interpret the

background and intentions of the evil the drafters sought to prevent. The thing these theories of interpretation have in common is that the result was most favorable to the authorities.

6.2.4.2 The Hague Convention

According to Kretzmer (ibid: 39-40) the question of belligerent occupancy was left to be decisively resolved until the Court simply applied customary international law as a matter of course. Justice Barak provided an unequivocal ruling that the legal regime on the West Bank and Gaza is based on the law of belligerent occupation:

“Judea and Samaria are held by Israel by way of military occupation or belligerent occupation. In the area a military government was establish at the head of which is the military commander. The powers and authority of the military commander are derived from the rules of public international law that deal with belligerent occupation.” (Ja’amait Ascan etc. v. IDF Commander in Judea and Samaria Region and another (1982) 37 (4) P.D. 785, 792, in ibid)

The “benevolent occupant” approach suggested by Justice Sussmann in the *Christian Society* case³³ agrees with a wide view of the notion “public order and civil life” in article 43 became the accepted view of the Court. This meant that the Court viewed that the occupying power’s duty includes “exercising regular administration, with all the brances adopted in our well-ordered state, including security, health, education, welfare, as well as quality of life and transportation” ([English summary: 13 *Isr YHR* (1983) 364] in ibid: 58).

The scope of research requires to specifically looking into the Court’s view on the separate notions of ensuring and restoring public order and civil life.³⁴

Kretzmer (ibid: 60-61) says that the Court’s stressing of the duty to ensure “civil life” (in a wide meaning of the general welfare of the population in the OPT) has not restricted the notion of public order in its narrow sense. The view is that the military commander has the power to protect the security of his troops as well as the duty to protect the general security in the area. The Court’s position has been that severe

³³ *Tabeb v. Minister of Defense* (1981) 36 (2) PD 622, 629

³⁴ For a wider discussion on the ISC view on the military commander’s powers and duties of a belligerent occupant, see Kretzmer 2002: 61-72.

security measures are permissible under article 43, in fact they may be positively required by the benevolent occupant's duty to ensure public order.

In the *Awwad* case³⁵ deportations of persons on security grounds the Court stressed the occupying powers right to protect its own security and argued that the violation of the Geneva Convention IV prohibition of such deportations does not “detract from the duty of the occupying power to ensure preservation of public order in the occupied territory, ...” (*Awwad* case [English summary 9 *Isr YHR* (1979) 343], in *ibid*: 60). Kretzmer (*ibid*: 60) claims that citing the article 43 of the Hague Regulations to legitimize a measure that is inconsistent with the Geneva Convention IV perverts the purpose of the convention, as the Convention recognizes the powers of the occupant to ensure security and gives provisions to limit these powers. In later cases the use of article 43 was used to legitimize security measures as restrictions on freedom of the press³⁶, not to allow local elections³⁷ and imposing a bond on parents to ensure good conduct of their minor children.³⁸

The *restrictions* on the mentioned powers of the military was addressed in the *VAT* case³⁹ where Justice Shamgar expressed that there must be a *fair balance* between military needs and humanitarian considerations and that “*The military interest or military necessity of themselves do not allow severe violation of humanitarian rights.*” ([English summary: 13 *Isr YHR* (1983) 310] *ibid*: 60). The Court has later frequently mentioned the duty of the military commander to balance security factors with other considerations, but has refused to enter the balancing issue itself. Kretzmer (*ibid*: 61) explains that the duty to balance has “*more often been part of the Court's rhetoric than of its actual decision-making.*” In the *Tamimi* case⁴⁰, an attempt to balance resulted in an apparent victory of the petitioners. Practicing lawyers in the West Bank demanded to establish a bar association elected according to Jordanian law and was met with a military order establishing a bar whose members would be appointed by

³⁵ *Awwad v. Military Commander in Judea and Samaria* (1979) 33 (3) PD 309

³⁶ *Al-Taliya v. Minister of Defence* (1978) 33 (3) PD 505.

³⁷ *Amar v. Minister of Defence* (1982) 38 (4) PD 645.

³⁸ *Tahaa v. Minister of Defence* (1988) 45 (2) PD 45.

³⁹ *Abu Itta v. IDF Commander in Judea and Samaria* (1981) 37 (2) PD 197

⁴⁰ *Tamimi v. Minister of Defence*, (1985) 41(4) P.D. 57, 59.

the civil administration in the military government and would enjoy only some of the powers given under Jordanian Law. The Court stated that the commander did not considered trying to find an acceptable balance between his duty and power and ordered the commander to consider to amend the military order to allow limited autonomy of the bar association. Kretzmer (ibid: 61) argue that even though the ruling would have the face of a final result which appeared to be a victory for the petitioners, *“the principle of professional independence was subordinated to the overriding interest of the military commander. The commander was merely ordered to allow some degree of input by the lawyers themselves”*.

The most comprehensive discussion of article 43 in the previously mentioned *Ja’amait Ascan* case (1982)⁴¹, where Justice Barak summarized the principles of the powers of a military government in occupied territory (in ibid: 68-69) before analyzing the facts of the case:

1. Under The Hague Regulations all decisions of the occupying power must be guided by one or both of two considerations: securing the legitimate security interests of the occupant in the occupied territory and ensuring the welfare of the local population. “The military commander may not consider the national, economic or social interests of his own country, unless they have implications for his security interest or the interests of the local population”.
2. Two factors determine the parameters of a military government’s powers in the occupied territory: (a) “the duty to act as a proper government that looks after the local population in all fields of life” and (b) the limitations imposed on a government of a temporary nature that does not exercise sovereignty, but rules under the laws of war.
3. Although the Hague Regulations were drawn up at a time when laissez-faire notions of government prevailed, when applying article 43 today, the relevant notions of public order and civil life are those prevalent in a “modern and civilized state at the end of the twentieth century”.
4. In applying article 43, it is essential to distinguish between short-term and long-term occupations. Even though the Hague Regulations were drawn up with short-term occupations in mind, article 43 can be applied to long-term occupations by taking account of the passage of time and of changing conditions in establishing the requirements of public order and civil life.
5. In a long-term occupation the military government’s duty to ensure public order and civil life may require long-term investments that will effect changes that will remain after the occupation ends. Such investments are lawful provided they are carried out

⁴¹ The petitioners objected to plan to build a major network of four-lane highways linking towns in the West Bank and Greater Jerusalem.

for the good of the local population and do not bring about material change in the basic institutions of the occupied territory.

The Court's decision was that the building of such a highway network was in the benefit for the conditions and needs of the area as a whole, not only to Israel.

Kretzmer (ibid: 69-71) points out the inherent difficulties of the application of the benevolent occupation. As the military government is not elected by the population in the OPT, how could they make controversial decisions regarding the benefit of the local population? The notion of "public benefit" is not disconnected to political objectives and interests. Kretzmer claims that the model applied by Justice Barak in the case is a reminiscent of a colonial model of governors which knows best for the "natives". Furthermore, there is no problem to prove that the building of the highway system was part of a general part of a plan for the West Bank. Kretzmer points out that even if the needs of the population in the OPT were taken into consideration, was it the dominant consideration, or a sub-factor related to the political interest of Israel. If so, according to Justice Landau's analysis in the previously mentioned *Elon Moreh* case, the decision should have been invalidated even if the planners if considered the needs of the population in the OPT. Finally, Kretzmer concludes that the principles listed above establish a theoretical framework for determining the exact powers and capacities of the parameters of a belligerent occupant's powers. The problem is that this framework fail in two aspects; (a) to address the inherent difficulties between balancing the occupants obvious concern to protect its own security and to ensure and cater to the needs of the local population, and (b) that large parts of the political establishment in Israel refuse to recognize that the OPT are subject to a regime of belligerent occupation. In later cases, the framework was applied, and according to Kretzmer (ibid) the dominant trend in the Court's decisions "*has been to rely on the benevolence of the military authorities*" and not to limit the powers of actions of the military."

6.3 Need for Security – The HCJ and Security in the OPT

Kimmerling claims (2002: 1136-137) the HCJ was an active part in breaking clause 55 of the 1907 Hague Convention; that occupying powers will act only as temporary

managers and beneficiaries of land and other properties in occupied territories; creation of permanent “*facts on the ground, which remain in the area after the occupation, is not permitted.*” The HCJ was an important part of the settlement policy developed in the years following the war. In the previously discussed case of the *Beth-El*, the HCJ ruled that confiscation of private land was legitimate if the owners were compensated for the purpose of establishing civilian settlements necessary for security purposes. Kimmerling points out that the issue of how a civilian settlement might serve as a “security measure” was never discussed or weighed. Indeed, it seems to me that at least some settlements are more of a burden than an advantage to Israeli security. The small settlements close to Jenin, which were part of Sharon’s disengagement plan of 2005, are examples of such, as well as the obviously highly controversial and security demanding settlements in the old city of Hebron.⁴²

6.3.1 Security Aspects and the HCJ

David Kretzmer (2002: 115) supplies a law-theoretical approach to the security issues before the HCJ criticized by Baruch Kimmerling above. Until the *Elon Moreh* case the argument of requisition of private land for establishing civilian settlements on security grounds was not contradicted by the HCJ. The security measures are characterized by two features: (a) the declared purpose is to contain a security risk and (b) they involve severe restrictions on the rights or liberties of the individual. Some have a clear punitive intention, like house demolitions⁴³, while others are declaredly preventive, as administrative detentions and curfews.⁴⁴

Kretzmer’s (ibid: 117-120) intention is to review the Court’s reaction to arguments that the rules of international humanitarian law and the conformation of accepted legal principles was breached in the military authorities measures to contain these security threats. I will use his framework to illustrate the Court’s approach to its judicial review of security measures

⁴² See discussion of the *Beth Hadassah* case below.

⁴³ The houses of terrorists and in some cases houses of their relatives are demolished. In addition to the punitive intention, an argument of prevention is been claimed.

⁴⁴ Even though being declared as preventive, these measures obviously have a punitive effect.

An initial point is that in the Israeli-Palestinian conflict it is difficult to maintain a clear distinction between legitimate security concerns and political considerations. As shown in chapter 3.1, a main characteristic of the conflict is that two ethnic groups or nationalities claim the right to the same area for its living space. Kretzmer point out that in such a context, each side may regard strategic actions taken in the struggle as actions connected to its collective security. In the Israeli-Palestinian conflict there is not much that is not securitized⁴⁵. This complicates the work of the HCJ. Some actions that clearly are political may provoke a reaction that leads the authorities to take measures subsequently attempted to be justified on security grounds.

Furthermore Kretzmer (ibid: 117-118) claim that the HCJ has in some cases been part of this process and refers to the *Beit Hadassah* case⁴⁶ which illustrates the logic of the analysis of the Court when it is faced with the results of political measures of questionable legitimacy. The legality of the settlement policies of the government is not thoroughly examined or evaded and their presence later becomes a fact justifying security measures that have consequences for the local population of the OPT.

My claim is that the building of the separation barrier *into* the West Bank reasoned on security reasons is an even better example of this logic than the *Beit Hadassah* case. The central problem of the barrier is that it is built outside the state of Israel, on Palestinian land. The HCJ has previously rejected and dwelled for long to challenge military authorities' requisition of Palestinian land to build civilian settlements in the name of security, and also failed to address the political motives of territorial expansion. The colonization in the OPT has created strong and violent reactions amongst the residents in the OPT, which again called for security measures to protect the settlers and the settlements, which again led to legitimization of restrictions on the freedoms and rights of the Palestinians in the OPT.

⁴⁵ See attachment 2: "*Israeli Security Politics*" chapter 3.3

⁴⁶ *Zalum v. Commander of Judea and Samaria* (1986) 41 (1) PD 528. Beit Hadassah is a building in the Hebron city center that belonged to Jews before 1948. In 1977 a group of female settlers took over the top floor and the government accepted that a *yeshiva* (religious academy) would be established there. Later a fence and security checks was established around the building, which the shopkeepers in the first floor petitioned against, see *Zalum v. Commander of Judea and Samaria* (1986) 41 (1) PD 528.

6.3.2 Scope and Principles of Review in Security Matters

Kretzmer (ibid: 119-120) claim that courts all over are reluctant to interfere in executive discretion in times of crisis. First, the notion that the general interest should prevail to the rights of individuals is likely to be widely shared not only among the executive branch, but also the public at large and the judges. Second, a reluctance to intervene judicially could be because the Court is not prepared to meet the responsibility for the outcome. Sometimes Courts explicitly refuse to take such responsibility, and when they do not, it is reasonable to believe that it is a conscious or subconscious factor in the decision-making. Third, Kretzmer claims that research done on decision-making in face of uncertainty reveals a bias in favor of omissions rather than commissions.⁴⁷

These three points are in all mostly rejected by the Aharon Barak in his introduction to the “*Judgments of the Israeli Supreme Court: Fighting Terrorism within the Law*” (IMFA 2005: 9-21). When it comes to scope of review in security matters, he states that in battle, the laws are not silent. He emphasizes that to fight terrorism, which acts outside the law, a democracy can not justify tools that neglect the accepted legal norms. He points out that the Court does not have a responsibility to intervene in military considerations, which expertise and responsibility is placed within the executive, but to intervene in considerations of equality. The war against terrorism is (ibid: 13) “..., *not merely a war of the state against its enemies; it is also a war of the Law against its enemies.*”

Furthermore, he argues that democratic nations need to consider the values and principles relating to the security of the state and its citizens, and at the other hand the values and principles relating to human dignity and freedom. The previously described concept of balancing and weighing competing values and the norms of reasonableness, fairness and proportionality⁴⁸ is put in context as Barak states that a democracy’s war on terrorism must be in proportion, and human rights is not a stage for national destruction as well as national security cannot justify undermining human

⁴⁷ Omission: To refrain for act, Comission: Performance of a positive act

rights. The synthesis between these two values reveals the (ibid: 14) “*rich and fertile character of the principle of law in particular, and of democracy in general.*”

Barak explains that a balance between security and freedom will impose certain limitations on both. A proper balance is not achieved when protecting human rights fully, as there is terrorism, and full protection of national security can not be achieved, as there are human rights. The concept of balancing security and human rights is a compromise as the price of democracy; only a strong and stable can afford and protect human rights, and only a democracy built on the protection of human rights can have security. Furthermore, the balancing point between these differs from case to case and from issue to issue under the norm of acting proportionality. He points out that finding such a balance is a result of a clear position between the two values at hand, not the lack of such. Barak advocates strongly intervening judicially, even that the influence of the timing: the Israeli war on terror, affects the content of it. Even though courts are “*more prone to uphold wartime claims of civil liberties after the war is over*” (Chief Justice Rehnquist in ibid: 17). Barak (ibid) states that he can not wait to adjudicate a question before him until the war on terror is over, “*because the fate of a human being may hang in the balance.*”

According to Justice Brennan (in ibid: 18) the judicial review in wartime must make sure that abstract principles of applying civil liberties during times of war and crisis are ineffectual in such times unless the principles are given substance by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security considerations. Throughout the introduction to the rulings Barak makes it clear that the Court should not act as security experts and replace the military commander’s security considerations with its own. Hence, the task of the Court is not to consider the way security issues are handled and the effectiveness of such measures, but to examine the legality of the military commander’s exercise of his own discretion. Furthermore, such an examination includes the application of reasonableness, determined by the relevant legal norms

⁴⁸ See chapter 5.5: ”Principles in the Work of the Supreme Court

applicable to the issue. The test of rule of law in this context does not only mean that it only applies to the cases that are brought before the Court, but also that governmental authorities are aware of the court's rulings and act accordingly. To the argument that judicial review validates governmental action, Barak states that the nature of judicial review is to not ask itself if it would adopt the same measures if it were responsible for security and merely to fulfill its role of reviewing the constitutionality and legality of the executive acts. The role to ensure that the war against terrorism is fought within the law is the Court's contribution to the Israeli democracy's struggle to survive.

6.3.3 *Rhetoric and Realities*

The view of Barak given above is typical of the new generation of judges. Kretzmer (2002: 119-120) points out that earlier the reluctance to interfere in security matters, was to limit the scope of its review. Later, when prepared to examine whether security considerations were the real reason for executing security powers, the Court did not consider it within their province to review the decision on its merits. In the 1980s the scope of review was extended by the ISC. After the Yom Kippur war, the myth of the infallibility in of the IDF was lost, and it may well have encouraged the Court to no longer have blind faith in the security decision in any sphere. Also, the extended scope in security matters followed a general trend of a new generation of judges in their activist approach to judicial review in general. Kretzmer claims that the recent years rhetoric of the ISC suggest that there is no difference between the scope of judicial review in security matters and other matters. Scholars like I. Zamir and G. Barzilai (in *ibid*: note 19: 226) points out that there is a disparity between theory and practice. A change in rhetoric and including security matters as a subject of judicial review did not necessarily reflect a greater willingness to make omissions. This is an essential point in my research. A judicial review of security matters and a liberal rhetoric could generate a façade of legitimacy, as Kimmerling has put it, if the actual decisions fail to exercise actual judicial control by limiting the powers of the military commander in the OPT, the Court could play the role of a legitimizing body. Kretzmer state that the change in rhetoric must have had important implications. The

potential inhibitive impact on decision making within the executive branch has led to a great decrease in the type of cases where the Court has had serious doubts whether security considerations were the genuine ground for the decision. An explanation of this is that the authorities have had to present the legal basis for the security measure. However, the potential disparity between rhetoric and action can not be ignored. The ruling in the case of the legality of the interrogation practices of the General Security Service⁴⁹ (GSS) exemplifies a number of factors highlighted in comments to theory and in the discussion of the HCJ and the OPT. According to Kretzmer (ibid: 139-142) cases regarding this subject had for years been either been refused to be ruled upon by the Court or left the legality of the interrogation methods open. The case is commonly viewed as one of the most courageous rulings of the HCJ. The Court mentioned the difficulties of the need of getting information from terrorists and terrorist suspect to prevent acts of terrorism, yet it accepted the legal arguments against use of physical force and other methods of pressure in interrogation. The lack of a legal basis for the GSS and the government made the Court rule that it was illegal to lay guidelines for use of such methods. Kretzmer states that the impression one gets from reading the decision is that the authorities did not have a legal case. Why the court used such a long time to give a decision when the methods so clearly were illegal?

“Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law.” (HCJ 5100/94, page 37)

Kretzmer (ibid: 141) points out that when the Court admits that the legal position is clear, the Court identified with the dilemma facing the security authorities. By that sense, it is reasonable to believe that when it could not deliver a decision that would legitimize the methods of interrogation, it simply did not deliver a judgment at all. In

⁴⁹ *Public Committee Against Torture in Israel v. Government of Israel*, 1999 (3) Tadkin-Elyon 458. This decision deals with two petitions submitted by NGO's (The mentioned NGO and The Association for Civil Rights in Israel) and five petitions submitted by individual interrogatees.

Kretzmers discussion of administrative detention (ibid: 129-135) and house demolitions (ibid: 145-163) he claim that the Court follows a pattern which runs through its decisions on all security measures: The Court has not given a detailed and careful consideration of the arguments of the illegality of such measures according to international law. *“On the contrary, international law has been used to legitimize the measure. No mention has been made of the restrictions placed on its use, nor was an attempt made to examine whether these restrictions are respected in practice”* (citation on the system of administrative detention; ibid 135). His conclusion on house demolitions (ibid: 163) states the same; the Court has failed to question the legality of the measure under international law and on the contrary accepted and legitimized measures which *“are highly dubious and interpreted the law in favour of the authorities.”*

Furthermore, he argues that if the Court had ruled that security measures employed in the OPT (house demolitions and deportations)⁵⁰ was illegal under international law, the military commander would lack the power (the powers of a belligerent occupant) to change the law. As the abovementioned case about interrogation methods is not under the law of a belligerent occupant, as the interrogations happen inside of Israel, the case was dealt with under the Israeli legal system. The Court opened a path for a parliamentary change of the law which prohibits such methods, and place the ultimate responsibility for lack of such measures on the Knesset as represents for the people (ibid: 143).

In the context of the barrier, the most important is the Court’s difference on rhetoric and reality in context of the settlement issue. There should be no controversial to claim that the fact that the barrier is built into the West Bank as a direct consequence of the settlements in the area. According Yuval Shany⁵¹ (2005:16), the HCJ has:

⁵¹ Senior Lecturer, School of Law, College of Management Academic Studies (Israel). While participating in preparing Israel’s written pleadings to the ICJ advisory opinion on the separation barrier, the article referred to is personal views by his own statement.

“always failed to apply the same rigid methodology it applied to tactical measures in the occupied measures, directly impacting individual rights, such as assigned residence and land confiscations, with respect to the strategic policies adopted by Israel – the annexation of parts of the occupied territories and the construction of settlements. Instead, the Court’s handling of the settlement issue has been characterized by refusal to exercise powers of review, resort to legal fictions and the utilization of non-justiciability routines.”

6.3.4 The Principle of Proportionality

As we will see the test of proportionality (ref. 6.2.3.1 and 6.3.2) was central in the *Beit Sourik* decision. How the Court previously has used this principle, is by that of importance. In his review of the HCJ and civilian settlements in the OPT, Kretzmer (2002: 81) claims that the Court’s reluctance or failure to apply the test of proportionality in the balancing of security and liberties characterizes its decisions in cases relating to the OPT. Even though the Court has been ready to extend the scope of judicial review to security matters (ibid):

“it has rarely been prepared to rule that insufficient weight has been given to basic individual rights in decisions relating to use of security measures against members of the Arab minority in Israel itself and against Palestinian residents of the Occupied Territories.”

However, the application of the principle of proportionality in the *Beit Sourik* ruling marks a different stand. The question before us is hence equal to the second research question: *“In applying the test of proportionality, weighing the two competing values at hand, was a meaningful analysis on the military commander’s inherent different interests of Israeli security in the area and his obligations to take the local inhabitations needs taken into account to serve as a constraint on his powers?”*

6.3.5 Comments on Temporary Findings

The above discussion shows the complexity of the topic at hand. As for the point i) in the operational set in 6.1 it seems quite obvious that the ISC as an institution and the Judges sitting in it are integrated parts of, in Kimmerlings words; *“an immigrant-settler society with its own logics”* and in Butenschøns words, *“the political subsystem of the Yishuv”* particularly when it comes to justiciability and reluctance to intervene facing possible claims of “acts of state” and the controversial political nature of many

cases. As the discussion in this chapter has progressed, the implications of this when exercising judicial review over the various parts of different political subsystems: the OPT, has gotten clearer. As for point ii) the court itself expresses in several rulings examined that they “*do not sit in an ivory tower*”; they are and can not possibly be disconnected from the political system it is a part of and the challenges the people it is the Supreme Court of, is faced with. This notion is however more nuanced than so. The Court has in a limited scale, but increasingly been willing to deal with controversial issues as security considerations of the military commander and the government and been ready to give decisions which must have been likely to not find much resonance in the executive branch or in the public. The potential of playing the role of a legitimizing body for the security measures taken in the OPT in has been displayed in general through the pre-analysis and specifically in the disparity between the liberal rhetoric and the realities of being a part of one of the conflicting parties in 6.3.3. So far, I claim that the obvious constraints in impartiality have been displayed.

This leads us to point iii) a. as David Kretzmer has brought to our attention the Supreme Court has displayed inconsistency in its view and interpretations of IHL. The rhetoric of principles at one hand and the pragmatism displayed at the other hand creates a blurry picture of the Courts role: In some cases and statements the role of the moral shepherd ruling in accordance with moral or political principles in its rulings either way. Other cases have proven the approach of arbitrary Court; in its reluctance to deliver a decision or the failure to thoroughly examine arguments of the illegality of the security measures taken by the military authorities. In addition, the inconsistent theories of interpreting article 43 of the Hague Convention IV which both was interpretations who were highly dubious and was in fact legitimising security measures taken by the authorities, rather than to give a careful consideration to the argument of illegitimacy of such. A wide interpretation of both the powers and duties of a belligerent occupant has been applied in this process of legitimatisation. In addition, the failure to challenge the settlement policy, which is widely claimed illegal of almost everyone except the Israeli government and the HCJ was displayed.

As for iv) it should be noted that time the comparatively extraordinary activist approach and judicial annexation give a picture of a Supreme Court that has not chosen the easiest path, but rather one it has seen necessary because the rule of law is what makes the democracy have to upper hand in a conflict with terrorism. However, as seen in the reluctance to rule on the interrogation practices of the GSS, Barak's arguments of the timing of judicial review does shed light to the disparity between rhetoric and realities. Again, a complete reluctance to rule on such cases reviewed above, taking the stand of non-justiciability under the "Acts of state" or the Political-Question doctrine, would in Barak's liberal rhetoric be a democracy unworthy.

The extraordinary dilemma the Court faces when balancing Israeli security and Palestinian Human Rights, is one that no judges or others envy them. However, in accordance with v), the very purpose of this discussion has been to raise questions of the HCJ approach in its balancing. The potential role of legitimizing military activity and political motives in the OPT has been displayed as the Court has let far let the security arguments prevail it from ruling on clearly illegal colonizing in form of settlements in the OPT, which later required additional security measures which was accepted by the Court. These measures lead to additional constraints on Palestinian daily life and human rights. Prevalent the security measures has apparently been weighed heavier than Palestinian human rights, and the expert arguments the Court has considered has mostly been of the one conducting or ready to impose these measures; the authorities and the military commander. Eventual political motivations of the executive or those conducting under their powers have seemingly not been examined thoroughly.

6.4 Operational Set II:

With these temporary findings in mind, the statement regarding the separation barrier communicated by the Foreign Ministry Spokesman (9th of July, 2004 at IMFA 2004) illustrates the potential legitimizing role of the HCJ in the matter of the separation barrier:

“Israel continues to seek the necessary balance between protecting the lives of its citizens and the humanitarian needs of the Palestinian population. We will continue to do so, in accordance with the rulings of our Supreme Court, which alone has the capacity to fully address all aspects of this matter. The fact that every individual affected by the fence has the right to directly petition Israel's Supreme Court ensures legal recourse without the need for outside involvement.”

This statement also illustrates the Israeli government's view on the International Court of Justice's advisory ruling on the legality of the separation barrier. The HCJ itself ensures the legality of the barrier and the route (in the eyes of the government) and hence outside involvement is not needed. In many ways the separation barrier in the West Bank appears to me as a pure symbol of the dilemma the Court faces. Recalling the words of Baruch Kimmerling (2002: 1129) there is no more sensitive litmus test to exhibit the character of the Israeli government than “areas in which the HCJ has intervened, or not, and the ensuing consequences”. Additional operational points for examination in the *Beit Sourik* ruling would be:

- vi) In the hearings and discussion of the Court were:
 - a. Both the security considerations and the human rights of the individuals examined thoroughly in their context?
 - b. The arguments about the procedures of seizures described in 4.5 heard and given weight?
- vii) Did any independent source of information on these issues been allowed in the Court, and what weight has this been given compared to the defendant and the petitioners claims and positions?
- viii) Did the international law application follow the suggested pattern found in Kretzmer's discussion?
 - a. Did the Court give a detailed and careful consideration of the arguments of the illegality of the security measure; the separation

barrier, according to international law? Specifically, did it address the clear link between the legality of the settlements the barrier sought to protect and the legality of the barrier itself?

- b. Was international law, on the contrary, used to legitimize the separation barrier as a security measure?
- ix) Was the framework used in the *Ja'amait Ascan* case to define the exact powers and capacities of the parameters of a belligerent occupant's powers? If so was the Court able to address the inherent difficulties between balancing the occupant's obvious concern to protect its own security and to ensure and cater to the needs of the local population?
- x) Did the tests of proportionality display a proper weighing and balancing of the two competing values at hand?
- xi) Did the *Beit Sourik* ruling pass the test of time as a "landmark case": Which implications did it have on later cases and were the impacts of the ruling substantial to the petitioners?

Recalling the words of Barak in 5.7.2; an activist Court that exercise judicial constraint on its military authorities in a time of war is exactly what makes a democracy and the law have "the upper hand" in its fight with terrorism – it gives the fight a cause. A passive Court that does not exercise judicial constraint on the authorities of belligerent occupancy is according to this notion unworthy a democratic state. Yet, an activist Court who legitimizes illegal security measures under different theoretical interpretations of IL and fails to its notions of impartiality and fairness and blurs the outcomes might be just as bad? So far it seems that the HCJ has proven to be a bit of all.

7 The Analysis: Beit Sourik Case – HCJ 2056/04

The petition for an *order nisi*⁵² from the Beit Sourik Village Council (2004) and seven other village councils was filed to the HCJ on February 26, 2004. The respondents 1. Government of Israel and 2. Commander of the Military Forces in the West Bank were requested to appear and show cause (ibid: 1) a) Why they do not cancel orders for the requisition of land that were issued on behalf of Respondent 2, which were given numbers T/84/03, T/103/03, T/107/03, T/108/03, and T/109/03⁵³ and b) why the route set by the respondents, along which the separation fence is to be built in the area included in the above requisition orders, is not cancelled or altered. The petition requested to issue the order nisi and a temporary injunction to stop any constructional acts of the separation fence or preparations of such activities. The HCJ was requested to hold an urgent hearing on the petition, and after receiving the Respondent's response, make the order nisi absolute. (Ibid: 28) Three days later, on February 29 on the first, of a total of 7 hearings and court sessions, an injunction was ordered.

According to my scope of research I will emphasize certain aspects of the ruling. First, the petitioners' and respondents' arguments of necessity, intention, extent and legality of the security measure and the types of and extent of injuries inflicted on the petitioners will be treated. A review of the hearings and the normative framework of the Court and its discussion on the legality in the military commander's exercised authority, and later, the application of the test of proportionality, will give answers to many of the questions of the operational set above. The decision on each of the seizure orders will be treated together with the Court's overview; the main purpose is to discover if the operational principle of proportionality and whether the application of it reflect the patterns of weighing and balancing found in the pre-analysis. The following discussion and references are within the *Piskei Din* of HCJ 2056/04⁵⁴ unless otherwise is mentioned and numbers in references refer to the paragraph numbers in the decision.

⁵² An "order nisi" is the judicial term for an order taking effect at a later specified time unless previously modified or avoided by cause shown, further proceedings, or a condition fulfilled

⁵³ All the orders of seizure's routes dealt with in the ruling are displayed in the two maps attached as "Map 1" and "Map 2".

⁵⁴ Attachment 3: "RULING_BeitSourik", also see list of references for URL.

7.1 The Court's Contextualization.

The contextualisation (1.-2.) of the Court gives a brief general description of the armed conflict between Israel and Palestinians following September 2000. The weight was given on the severe consequences of the Palestinian “*campaign of terror against Israel and Israelis*” and the complexity of this threat and the fight against it. Military operations did not stop the terror and this was accordingly the background for the decision to build the separation fence. The Court (3.-6.) refers to the Ministers’ Committee for National Security’s decision on April 14, 2002 to deploy an obstacle in the “seamline area” and the following three decisions of the government on the 4 stages of the fence. The main points in these decisions are that the construction is a response to terror, and is a security measure of operational principles to contain these threats (ref. chapter 4.2) and that it does not mark a national border or any other border (4. (4)). The psychical qualities of the fence were explained (7.) and the seizure proceedings and the opportunity to petition against it. The point of compensation was not dwelled with, neither who was to decide the amount of such. (8.) The total length of the route which was subject to review in the case was 40 kilometres.

7.2 Arguments of the Petitioners

The 8 villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A’anan, Beit LKia, Beit Ajaza and Beit Daku, northwest of Jerusalem are adjacent to Israeli towns of Mevo Choron, Har Adar, Mevasseret Zion and the Jerusalem neighbourhoods of Ramot and Giv’at Zeev. (9). The petitioners are landowners and village councils affected by the orders of seizure, which they argued were illegal. The claimed injuries to them were severe and unbearable: The obstacle passes over 4,850 dunams, will separate the petitioners from 37,000 dunams, 26,500 of which are agricultural lands. Access to water wells, agricultural lands will due to a bureaucratic permit regime be burdensome or impossible, tens of thousands of olive and fruit trees will be uprooted, and additional tens of thousands of trees will be separated from the villagers. Furthermore the livelihood for hundreds of families will be critically injured. The lives of all 35,000 village residents will be disrupted, and harm the villages’ ability to

develop and expand. Access to urban centres like Ramallah and Bir Naballa will be blocked and access to medical and educational services will be impaired.

The petitioners performed claims (10.) that the respondent lacks the authority to issue orders of seizure of land in the West Bank and argued that these alter the borders of the West Bank with no express legal authority. Furthermore, the fence serves the needs of the occupying power and not the needs of the occupied area, more specifically the objective of the fence is to protect infiltration into Israel, and is hence not intended to serve the needs of the occupying power. Further claims were that the military arguments do not reflect the security necessity, but serves the purpose of disguising the real objective of annexation of areas to Israel, *hence referring to the linkage of the legality of Israeli settlements and the erection of the fence within the West Bank*, which makes the orders of seizure illegal. In addition they claimed that the procedures of orders of seizure were breached as most of the landowners got to know the orders by chance. An extension of only a few days to submit appeals and thus they were not allowed to participate in the determination of the route.

The claims of violations fundamental individual rights (11.) included right to property, impediment of freedom of movement including access to property, education and health services, freedom of religion as access to holy places would be prevented. The fence route was argued to reflect collective punishment; violations are disproportionate and are not justified under the circumstances; and by that breaching the obligations of the occupant under international law; to make normal and proper life possible for the inhabitants in the West Bank. The security arguments can not fulfil these violations under the requirements of proportionality and despite the orders language; the fence is clearly not of a temporary character.

7.3 Arguments of the Respondents

The arguments on the orders of the seizure (12.) were initiated referring to the combat against the wave of terror earlier described in chapter 3 and 4. The objectives, the operational-security considerations and the efficiency of the fence adhered to governmental arguments in chapter 4.2. In addition, the forces acting along the obstacle and Israeli towns on both sides of it must be protected. The most important

claim for the planned route of the fence was that in a case of infiltration, a “security zone” is required to provide warning and pursuit possible. An additional reasoning for the route is that attempted attack after the construction of the obstacle will be *“concentrated on Israeli towns adjacent to the fence, which also must be protected.”*

To the claims of violations towards and injury caused to the Palestinians in the area the respondents argued (13.) that *“great weight was given to the interests of the residents of the area, in order to minimize, to the extent possible, the injury to them.”* An effort was made to lay the route on property which is not privately owned or agriculturally cultivated, consideration to planning schemes of Palestinians and Israeli towns and to not cut off lands from their owners. In case of the latter, agricultural gateways will allow farmers access their lands. Compensation will be where damage can not be avoided and an improvement of the road system between the villages had been decided and the possibility to pave a road to Ramallah was being examined. These considerations were claimed to ensure a proper balance between the protection of Israeli citizens and soldiers and the needs for the local inhabitants.

Opposing to the petitioners claims, the seizure was brought to their knowledge and given the opportunity to participate in a survey and to submit appeals. The contractors responsible for building the obstacle were instructed to move trees wherever possible and some buildings, to the extent possible, were taken down in cooperation with the landowners and transferred to agreed locations. Furthermore, the respondents argued that the inhabitants did not always take advantage of the right to have their arguments heard. (14.)

The orders of seizure were claimed to be legal, as the power to seize land for erecting the fence is a consequence of the right of Israel to defend herself against threats outside her borders. The abovementioned claims of consideration for the local inhabitants and the right to defend itself (in accordance to the Hague Regulations, my note) they have kept the injury inflicted proportionate. Furthermore, respondents denied the extent of injury claimed by the petitioners to the extent of area seized for the building of the fence, the injury to agricultural areas and trees and groves were by

far lesser. Also, the arguments of injury in terms of access to water for agricultural purposes, medical access (every village has a medical clinic as well as a central clinic in Bidu) and that educational needs of the villagers would be taken into account. When injury is caused, effort to minimize that injury was claimed. The respondents' position was that the petitions should be denied by the Court.

7.4 Procedural Hearings

After the first hearing, where it heard the petition on February 29, the Court (President A. Barak, Vice-President (ret.) T. Or and Vice-President E. Mazza) decided to postpone the hearings for a week in order for the parties to be able to prepare their arguments and to attempt to reach a compromise and issued an injunction. During the oral hearings, modifications were made to both parties' arguments and the respondents were willing to change parts of the route, most notably the part between Har Adar and Beit Sourik. (16.)⁵⁵

On the 3rd hearing March 17, the petitioners submitted a motion to file additional documents, which the affidavit of The Council for Peace and Security (CPS) was considered the most important. The CPS is a society including high ranking reserve officers, lead by its president Major General (res.) Danny Rothchild. It views itself non-partisan, and in this context they were among the "*first to suggest a security fence as a solution to Israel's security needs.*" (ibid) Nonetheless, the arguments in the affidavit regarding segments of the route of the fence and the reservations from a security perspective were so grave and serious that the Court requested the comments of the respondent 2. Lieutenant-General Mose Kaplinsky.

Prior to reconvening on March 31, the Court (now without Vice-President T. Or (resigned) replaced with Justice M. Cheshin) granted petitioners' motion to amend their petition to include additional orders issued by respondent: Tav/110/03, Tav/104/03 and Tav/105/03 and decided, after hearing the parties' arguments, to issue and order nisi. The application of the temporary injunction was narrowed, to allow

⁵⁵ For maps of the area in question, see "Map 1" and "Map 2" attached electronically. The maps display the "Tav" – seizure orders locations, the route planned, changes made during the hearings, the petitioners suggestion for a route, as well as an alternative route suggested by the Council for Peace and Security.

work in certain segments of the route, and at the same time narrowed so that the respondent did not make irrevocable changes in other segments close to the villages of A-Tira, Beit Daku and north of the Israeli town Har Adar. The parties' arguments were heard on April 16, April 21 and May 2, 2004. The petitioners submitted an alternative route, additional affidavits were submitted by CPS and by respondent. (17.) Members from CPS, D. Rothchild, A. Adan, S. Giv'oli and Y. Dvir were moved to be joined as *amici curiae*⁵⁶ after the approval of the parties, and an additional affidavit submitted by CPS (15 April 2004) joined to the petition, noting that their position were not identical to the petitioners. (18.)

7.4.1 Positions on the Route of the Fence

The position taken by the CPS (ibid) was that the fence must accomplish 3 objectives: a) prevent, or at least delay the infiltration of terrorists into Israel; b) grant warning to the armed forces in the event of an infiltration and c) it must allow control, repair and monitoring of the forces posted along it. The substantial argument that differed from the respondent's position was based merely on security considerations, which subsequently also would imply less injury to the local inhabitants: The fence must be far from the houses of the Palestinian villages, not close to them. If too close, it would be easier to attack the forces patrolling it. The planned route will require the respondent to build gateways and passages; friction will arise from the injury inflicted on the local population and their bitterness would increase the danger to security. To the argument of a "security zone" enabling response time in case of infiltration, they stated that this could be overcome by the reinforcement of the obstacle near Israeli towns. The planned route to seize hilltops with topographical control, distant from Israeli towns, decrease the functionality of the fence, increase its length, increase chances for attacks on it and was argued to be unnecessary. In an additional affidavit submitted 3 days later CPS stated that the security argument of the commander of the area to prevent direct flat-trajectory fire upon the fence "*causes damage from a security perspective.*" This desire makes the fence to pass through areas that are

⁵⁶ An individual or organization that is not a party to a particular lawsuit but is allowed to advise the court regarding a point of law or fact directly concerning the lawsuit.

superfluous, even though they have topographical control, unnecessarily injuring and increasing friction with the local population, all without preventing fire upon the fence. (Ibid)

The petitioners acclaimed the arguments of the CPS, pointing out that it will endanger Israel and her soldiers, as well as the route planned was not the least injurious route. (19.). Furthermore, a number of residents of Mevasseret Zion, an Israeli town close to Beit Sourik, was granted to join the petitioners, and supported their request of moving the fence to the green line. Furthermore, they claimed that the plans of erecting a fence had lead to a decline in relations with the Palestinians in the area and turned from a tranquil to a hostile one. (22.)

The respondent recognized the security and military experience of the CPS, but pointed out that the security responsibility remains on his and other security officials shoulders. The Court noted that on disagreeing arguments between experts of security, the one responsible should be given greater weight. The respondent highlighted the operational aspect of a “security zone” and claimed that the arguments of CPS did not offer a solution to the need of pursuing infiltrators that made it through the fence. Although, the close proximity to the houses of the Palestinian villages would be likely to cause difficulties, this is only one of the considerations which must be taken into account.(20.) Mr. Efraim Halevy, from the same town mentioned above, was granted to join the respondents in the petition, claiming that a route following the green line would endanger the lives of the residents in Mevasseret Zion and pointed to the terrorist activity that had taken place in the past in the Beit Sourik area.

7.4.2 Initial Analysis – Test of Kimmerling’s Arguments on Security

The fact that the Court accepted the affidavits of CPS and moved them to be part of the petitioner’s side in the hearings apparently contradicts the claims of Kimmerling (2002: 1131-132) regarding that the HCJ was one of the central mechanisms in the management of the conflict by how the term “security” was used and interpreted “*in a very simple, even simplistic, technique, that was astonishingly effective*”:

“First, any time that the state justified its actions, or inaction, under the aegis of “security needs” or “security reasons”—in nearly all cases, the court accepted this explanation without any further investigation of the matter (Barzilai, 1998). Second, the term “security” was almost never examined within the context of the presentation of the petition, and the court granted carte blanche, without appeal or restriction, a monopoly on determination of “security needs” to the state and the executive branch. This situation is outrageous, particularly given the fact that the court sees itself as an authority certified to rule on every area of the life of an individual or of the collectivity—including economics and banking, government affairs, medicine and biology, religion, education, and the media. The sole exception is areas that the state claims are connected to national security. The court can use independent expert witnesses in any field, but in the area of security, the experts recognized almost exclusively are the bodies that the court should consider the most questionable—other state authorities, in particular the army and security agencies. Third, in many cases, the court acquiesces to the state’s demand to present the testimony of government experts on camera. This secrecy creates a situation in which testimony and evidence is withheld from the legal representative of the side opposing the state.”

The security arguments were, to my understanding, thoroughly examined in the hearings with reference to my operational set II (hereinafter (II)): vi), and no arguments were withheld from the legal representatives of the petitioners. The omission of the Court of first acknowledging CPS as *amici curiae*; a claimed independent expert on security, and later moving them to join the petitioners’ side opened for an external expertise, ref. (II) vii), and the fact that the CPS arguments are likely to have persuaded the respondents to conduct changes in the route during the hearings, all contradict to the arguments of Kimmerling. I will argue that there are some factors of moderation for rejection of the applicability of the criticism in the case at hand: a) although the CPS is claimed non-partisan, they are not disconnected from their experience of serving in the Israeli military authorities and being part of the Israeli society. Yet, their greater extent of impartiality than the respondents combined with the fact that their arguments were claimed to be merely based on security considerations and not on balancing the two opposing values in focus, their arguments would presumably imply greater impartiality than the security arguments of the respondents. However, as we have seen, the Court stated that the arguments given greater weight to were the one responsible for the security in the area: the respondent. By this, b) the Court opened for external expertise, yet as the Court stood before

“contradictory military opinions regarding the military aspects of the route of the separation fence” (47.), the Court chose to follow the tradition of giving special weight to the ones responsible for the security in the area ref. (II) vi) b. However, it should be noted that this corresponds to a central democratic notion of correspondence between authority and responsibility. The contextualization of the Court did display the suggested impartial (although, understandable) focus, yet the Court firmly stated in the first few pages of the ruling that the security fence was a response to terror and nothing else, which requires that point (II) viii) a. the clear link between the legality of the settlements and the legality of the barrier needs to be taken a close look at.

7.5 The Court’s Normative Framework

As the parties agreed to that the general starting point was that Israel holds the area as a belligerent occupant and that the authority of the military commander stems from the Hague Regulations of 1907. As the parties also agreed that the humanitarian rules of the Fourth Geneva Convention also applied in this case, the Court did not have to take a stand on this matter, as it had done before (ref. 6.2.4.1). (23) The principle of Israeli administrative law applied to the commander (ref. 6.2.3.1), and its norms of substantive and procedural fairness, the obligation to act reasonably and the norm of proportionality. The Court referred to the earlier mentioned *Jam’iyat Ascan* case that every Israeli soldier carries with him the provisions of international law and Israeli administrative law. (23.)

The Court made clear the two questions before it in light of the petition, the response and the arguments of the parties (25.): “*Is the military commander in Judea and Samaria authorized, by the law applying to him, to construct the separation fence in Judea and Samaria?*” and an “*affirmative answer to this question raises a second question concerning the location of the separation fence.*” The justification for dealing with the first question in brief was that only a small part of the arguments before the Court dealt with it, while the second question was the one the parties elaborated on.

7.5.1 Authority to Erect Security Fence: Research Question 1.

The question at hand was simply an authority question of the military commander to construct the fence in the West Bank under the normative framework set by the Court. The petitioners based their claims on the lack of authority on two arguments.⁵⁷ The first argument (26.) claimed that there were political ambitions, rather than security considerations to erect the fence. The second argument (32.) was that large parts of the area of the orders on seizure were land privately owned by local inhabitants, and by that was illegal.

7.5.1.1 Motivation of Orders of Seizure to Erect a Security Fence

The court agreed that if the military commander's reasons for the orders of seizure to erect a fence were political, he would lack the authority to do so. Furthermore the Court referred to the three different cases to shed light to this question (27.). In the *Dweikat* case (1979), discussed in as the *Elon Moreh* case in 5.3, 6.2.2 b), 6.2.4.1, 6.2.4.2 and 6.3.1, the court rejected the security arguments for confiscation of land for a settlement, which the Court found the motivation was *de facto* based on a Zionist ideological reasoning under the Court's interpretation of article 52 in the Hague Regulations. In terms of the illegality of measures due to political motivation, Barak wrote in the *Jam'iyat Ascan* case, 794, that "*the military commander is not permitted to take the national, economic, or social interests of his own country into account... even the needs of the army are the army's military needs and not the national security interest in the broad meaning of them...*"

The framework of the *Jam'iyat Acsan* case (ref. 6.2.4.2 and (II) ix) was used further to justify the powers of the military commander (27.), the planning and execution of the road system can be justified for military reasons and to ensure welfare of the local population, but not done in order to serve occupying country.

This gives strength to the suggested pattern of the HCJ to use IHL to justify the powers of the benevolent occupant, rather to constraint it. The Court fails to address the fact that driving on these roads, or even crossing them, with cars with a PA (and

⁵⁷ In the English translation of the decision, the term "assertion" was used on the claims of the petitioners that the military commander does not have authority to construct the fence. The term is usually used on "positive statements or declarations, often without support, reason or proof".

not Israeli) licence plate is illegal and that in the aftermath of the decision, there is an obvious connection between the policy of settlements in the West Bank (ref. Kretzmer's arguments in 6.2.4.2) and later required infrastructure for settlers and the military protecting them (ref. the logic discussed in 6.3.1). The word of the Commander of the IDF Forces in the West Bank (respondent 2.) in affidavits submitted to the Court stating: "*it is not a permanent but rather a temporary fence erected for security needs*" (29.) and "*the objective of the security fence is to help contend with the threat of Palestinian terror*" (ibid). The Court held that they give his testimony full weight and had no reason to believe the military commander. The governmental decisions and the wordings of it (see 7.3) give the Court reason to come to the conclusion "*that the fence is motivated by security concerns.*" (28.) Furthermore the Court holds that the burden of evidence is upon the petitioners, and that they failed to convince that motivations and considerations behind the security fence "*are not military considerations, and that he has not acted to fulfil them in good faith, according to his best military understanding.*" (31.)

On the weighing of arguments of motives behind fence the Court is clear (30.), the petitioners argument that if the fence was primarily motivated by security considerations, it would be constructed on the "Green Line." The Court states that they can not let a political perspective as such interfere with the security perspective, which must examine the route on its security merits alone.

7.5.1.2 Legality of Orders of Seizure of Privately Owned Land

The second argument of the petitioners were definitely rejected by the Court, as it found no defect in the process of issuing the seizure, or in the process of granting the possibility to appeal them. (32.) The Court did not discuss extensive claims of the respondents (Beit Sourik Village Council 2004: 6.-8. and 12.-30.) of such defect in the initial petition corresponding to (II) v) b. The Court did seemingly not examine the claims of the petitioner of the breach of procedures, but simply stated that it did not find such breaches relying on the respondents claims that they were not (32.). The Court (ibid) stated with reference to a number of 7 – including HCJ 606/78 - discussed under 6.2.2 b) and 6.2.4.2 as the *Beth El* case – cases of taking possession

of land and houses, that it had “*recognized the legality* [of such seizures on the basis]... *of various military needs*” (ibid) on the basis of the basic provisions of the Hague Convention article 23(g) and 52 and the Geneva Convention article 53. The military commander must consider the needs of the local population, and “*Assuming that this condition is met, there is no doubt that the military commander is authorized to take possession of land in areas under his control.*” (Ibid). Furthermore the Court held that the infringement of property rights were insufficient, in and of itself, to take away the authority to build it.

7.5.2 Conclusions to Research Question 1

The Court’s discussion on the authority issue (27.-30.) does not mention the possibility of dual or several motivations of the construction of the fence. As noted in 4.6 (and other places) the separation barrier does have qualities of a land grab, while at the same time, the barrier is an effective security measure. As shown through chapter 6, the Court does not challenge the security considerations of the authorities, as it simply is not within their expertise and sphere (ref. 6.3.2), at the same time give full weight to their claims of intentions and place the burden of evidence at the petitioners and give the impression that the intentions which leads the government must be *either* security considerations, *or* political motivations. The question on the authority issue if the Court examined the possibility that there were dual intentions behind the planned fence was left open by the Court. This correspond with Kimmerling’s criticism above; in all other sphere the Court views itself compatible to act as experts and the final result of the consideration was a complete trust in the same authority that was the respondent in the case. In regards of IHL the Court followed the suggested path found in the pre-analysis put forward in (II) viii) a. and b.: It justified, more than a constrained in the authority issue.

The Court obviously is on pretty safe ground regarding the justification on the second argument of the petitioners according to international law. The reason for this is its **total acceptance** of the word of the respondents of the motivations behind the fence. External expertise, CPS, did not differ from the respondents in arguments of motivation behind the obstacle, and even if they did, the Court would take a prevalent

stand as it did in the matter of “different arguments of military expertise” – the full weight given to the respondents with reference to Kimmerling’s critique above.

The inherent difficulty of balancing these provisions and the notion that the military commander is able or in the position to decide what is the “needs of the local population” or to the “public benefit” (as discussed in 6.2.4.2 and ref. ix) was not discussed. The Court stated that the considerations of the local inhabitants did not relate to the question of authority to erect the fence, rather on the route of the fence. Hence, it disconnected the needs of the population from the authority to erect it, without elaborating on the issue.

Furthermore, the justification referring precedent cases granting power under the Hague Regulations and the Fourth Geneva Convention should be discussed. In the *Beth El* case, as discussed in 6.2.2, non-justiciability was claimed by the Court even though the individual claim of illegal confiscation of land was recognized. How a civilian settlement may be an instrument of security has never been thoroughly examined, either by the claim of non-justiciability or to the political-question doctrine; hence the Court failed in applying the illegality of confiscation of private property in order to establish settlements and pinpoint the distinction between the authority to requisition of land for security purposes and to confiscate land for civilian settlements, which by no means can be called a feature with the physical qualities of temporariness.

In the *Beit Sourik* decision under the explicit applicability and enforceability of the Geneva Convention IV under its normative framework, the *Beth El* case was listed as one of the cases serving as justification of the legality of seizure of private property. This logic is disturbing, laying the normative framework to include the Geneva Convention, more specifically the 53rd article – and later justify seizure of private property with a case in which the Court did not recognize the applicability and enforceability of the same convention. This contributes to the suggested pattern found in the pre-analysis, expressed in (II) viii) a. and b.: IHL was used as a mean to grant authority, rather than to impose constraints on the powers of the military commander

As the *Beit Sourik* ruling was the first comprehensive ruling on the matter of legality of the separation barrier, the clear failure of addressing **the link of legality between the settlements and the legality of the separation barrier** (ref. viii) a.), it legalized the barrier simply by evading this question. One can not claim that the route of the barrier – the fact that it was built into the West Bank – was primarily dictated by the location of the Israeli settlements⁵⁸, this is clearly stated within the decision although the settlements are not mentioned specifically, but as together with Israeli towns within the Green Line, as “Israeli towns”. This fact follows the patterns found in the pre-analysis: despite the explicit claims seen above that the Court would not hesitate to rule the barrier illegal if it was politically motivated and then not even discussing it the link of legality between the Israeli settlements and the barrier in **one line** or **one paragraph**. International law is being applied inconsistently, mostly legalizing the authority of the military commander.

My conclusion claims on the matter are; that due to the HCJ’s position as a) an integrated part of the settler-immigrant society; b) hence, deriving its power from and being a part of the Yishuv; c) in its activism expanding its judicial review to include the OPT; a population the Yishuv has been in conflict with has been for decades and decades; **it has created an utterly difficult scenery for implementation of liberal rights-focused rhetoric and *de facto* security concerns**, with the result of acting more as an arbitrator than a moral shepherd; i) having great difficulties to display consistency in its application of IHL and IL regulating belligerent occupation; ii) continuously evading the legality of the settlements and its infrastructure due to that it is a highly politicized issue; and finally in this case; iii) again followed the logic of legalizing security measures to protect facts on the ground which legality is highly dubious and in most cases internationally condemned (ref. my arguments in 6.3.1) and viii) b.) by this institutionalising injustices done by the government in the OPT. This serves as conclusion to my first research question. The second research question; whether a constraint on the military authorities was imposed by the HCJ in terms of its weighing of the two competing values at hand is yet to be examined.

⁵⁸ See the attached “map 2” and the settlement of “Givat Zeev” and discussion in 4.1 and 4.2.

7.6 Legality of the Route of the Fence.

The limitations in power or the discretion of the military commander is within the normative system in which he acts, and which the source of his authority is. (33.) The Court explained the security ensuring authorities the military commander yields under the law of belligerent occupation, and that it must be properly balanced against the rights, needs and interests of the local population with reference to many rulings, most extensively expressed in HCJ 2977/97 *Thaj v. Minister of Defense* where Justice Levin wrote: (in *ibid*:34.)

“The Hague Convention authorizes the military commander to act in two central areas: one – ensuring the legitimate security interest of the holder of the territory, and the other – providing for the needs of the local population in the territory held in belligerent occupation.... The first need is military and the second is civilian-humanitarian. The first focuses upon the security of the military forces holding the area, and the second focuses upon the responsibility for ensuring the well being of the residents. In the latter area the military commander is responsible not only for the maintenance of the order and security of the inhabitants, but also for the protection of their rights, especially their constitutional human rights.”

The Court claimed that the expressed approach is well anchored in the humanitarian law of public international law and referred to Hague Regulation 46 and article 27 of the Geneva Convention and stressed that *“the right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, ...”* (35.) The court specified the double obligation put on the military commander by the two articles; *negative*: to refrain from actions that injure the local inhabitants and *positive*: take the legally required actions in order to ensure that the local inhabitants shall not be injured. To find a proper balance between security and liberty the concept of proportionality was applied to the route.

7.7 Proportionality

Briefly stated, the Court pointed out that the principle of proportionality not is specific to the law of belligerent occupancy, but a general problem in both domestic and international law and its solution is universal, found deep in the general principles of law, including reasonableness and good faith (36.) In Israeli administrative law it is

enshrined in article 8 of the Basic Law: Human Dignity and Freedom (The State of Israel 2006b):

“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required”

In opposition of what Kretzmer claimed (ref. 6.3.4) the Court said that principle of proportionality has been the standard for balancing the values as common thread running through the case law. (39.)

7.7.1 Concept of Proportionality – 3 Subtests

The term proportionality is general: The relativity between the objective it seeks to achieve and the means used to achieve it. Three subtests grant specific content to the principle. (40.)

1: **The appropriate / rational means test:** The means used must be rationally lead to the realization of the objective.

2: **The least injurious test:** In the spectrum of means which can be used in order to achieve the objective, the least injurious to the individual must be used.

3: **The proportionate means test:** the damage caused to the individual by the means used in order to reach its objectives must be of proper proportion to the gain brought about by that means.

The Court stated that the means used by an administrative authority would only adhere to the principle of proportionality if all the subtests are satisfied. (42.) The most interesting about the Court’s discussion about the principle was however the distinction between different views on the proportionate means test. It is often applied with absolute values, directly comparing the benefits of the administrative act with the damage that results from it. (41.) The Court opened for a different solution, applying the test in a “relative manner”. This approach means that the administrative act is tested vis-à-vis an alternate act, whose benefit is somewhat smaller than that of the former one. The original act would be disproportionate if a certain reduction in the advantage gained by the original act, by employing alternate means, ensures a substantial reduction in the injury caused by it.

The fact that the Court used the principle of proportionality inclines a genuine desire to protect the rights of the individual while at the same time standing firm on the

ground of the authority of the military commander to erect the security fence. The challenge will now be to examine the Court's actual weighing of the values within the abstract operationalisation of the principle (ref. (II) x)).

7.7.2 Factual Foundation for Proportionality Test on Route of Fence

Before applying the three subtests to the route of the fence, the Court summed up the factual foundation for their analysis of the proportionality. As seen above, the Court worked under the assumption that there were security motives for the erection of the fence and not political motives, that the military commanders planned route is based on realizing the security objectives the fence is meant to achieve and that the military commander believes that the injury inflicted upon the local population is proportionate. (45.) Furthermore, the Court made it clear that they would not interfere in the security considerations of the military commander and give his considerations on the military character of the route full weight over the CPS's arguments in regards of the first subtest as it was a test of proportionality of military considerations (ref. my comments in 7.4.2, point b)) . (46. and 47.) To the question relating to proportionality between the military consideration and the humanitarian consideration the Court took a different stand: "*The question is whether, by legal standards, the route passes the tests of proportionality.*" (48.) The legal aspect of this subtest was viewed within the expertise of the Court, as the standard is objective, not whether the military commander subjectively in good faith believed it to be proportionate.

7.8 The Orders of Seizure: Research Question 2

The facts laid before the Court in the seven sessions it held were as we have seen extensive. The factual basis of the analysis of the proportionality principle were considerable collected from both parties, Israeli residents in a town in the area divided in their support of the parties, external experts: the CPS, as well as an expert report on the ecological impact (21.) of the barrier. This and the very precise and extensive discussions of each of the orders, indicates that in the test of proportionality the Court did examine the security considerations and the human rights of the individuals

thoroughly in their context, ref. (II) vi) a. This is the basic assumptions for the brief of analysis of the orders of seizure.⁵⁹

7.8.1 Application of Subtests on the Orders of Seizure

For all orders, as a consequence of the full weight given to the military considerations of the commander, the first subtest of *rational means* to achieve the security objectives was fulfilled. The same applied for the second subtest, *the least injurious test*, on all orders. In the orders where the CPS argued that the security objective could be achieved in a satisfactoral manner, or even better from a military viewpoint, and cause less injury to the local inhabitants the Court again gave full weight to the military commander. In the orders of 104/03; 103/03, 84/03, 107/03 and 108/03, the Court was not able to give an affirmative answer to whether the CPS's alternative route fulfilled the security objectives to the same degree as the planned route and followed the pattern to grant full trust in the military commander.

However, applying the third subtest, *the proportionate means test*, the Court stated that it granted full trust in their own expertise and nullified the orders of 104/03, 103/03, 84/03 and ordered that the parties should continue to find a better solution in order to fulfil the demands of proportionality in the order of 107/03 (central part). For the eastern part of 107/03, 108/03 and 109/03 the Court order the commander to consider the route again and suggested that the route provided by the CPS could be used. However, the determination of the route was stated to be the military commander's affair, as long as it fulfilled the test of proportionality.

7.8.2 Conclusions

The examination of each of the orders were convincingly detailed both in terms of security considerations, the injury imposed on the local inhabitants and the possibilities of fulfilling both values in a satisfactoral relative manner (II) x) focusing on the breaches of IHL and the obligations of an belligerent occupant. This moderates the criticism above, of using IL as a mean to merely justify the military

⁵⁹ The petition of order Tav/105/03 was rejected as it was not subject of substantial dispute by the parties and the segments relevant to the petition was changed during the hearings. (50.)

commander's powers in the OPT. Specifically, the Court specifically addressed that the injury to local inhabitants of the area were, in the order above: "*acute and severe*" (60.); "*severe*" (67.); the route was "*in no way proportionate to the additional injury to the lives of the local inhabitants caused by this order*" (71.) and that the new route decided by the commander had to *free the village of Beit Sourik (and to a lesser degree the village of Bidu) from the current chokehold and allow the inhabitants of the villages access to the majority of their agricultural lands*" (ibid); and that the same as the latter applied for 109/03. The Court did not wrap its opinion in: "*The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands . The injury is of far wider a scope. It strikes across the fabric of life of the entire population.*" (84.)

The court ruled about 30 of the 40 km reviewed illegal due to the severe injuries of the population. Despite the fact that they granted full trust in the military commander's considerations in the two first subtests, **they exercised substantial control in applying the third**. The petitioners did not manage to get the Court to rule the barrier illegal. Reviewing the weight given in the petition (Beit Sourik Village Council 2004) and the ruling's summary of the hearings, I will claim that they did not expect to get the Court's support in these claims. The actual relief of the villagers would be determined by the commander's new route, yet the ruling was in my opinion clear and significant in terms constraining the power of the commander and balancing the two values at hand. In the aftermath of the ruling (II) xi), the HCJ has reviewed over 40 similar cases, and in addition, there has been a great "*shadow of the Court*" impact – out of Court agreements due to the stand taken in the *Beit Sourik* case. The new route adapted by the Israeli Government in April can also be view as a direct result of the ruling. However, this does not change the fundamental conclusions to the first research question. The harsh criticism of Baruch Kimmerling may have seemed out of proportions before testing it analytically.

8 Final Remarks

The two very different conclusions of my research questions contribute to my notion about the HCJ before the application of the critical arguments on the case. In light of the “*integral part of an immigrant-settler society which maintains its own logics and must maintain for itself a territorial living space*” approach of Baruch Kimmerling, the *Beit Sourik* must be interpreted as a legitimization of the separation barrier. The ruling that the route was disproportionate in light of the fact that the ruling was given just weeks before the International Court of Justice’s advisory ruling can however not substantially explain the Court’s displayed concern to protect Palestinian human rights. The precedent of not decisively dealing with the fundamental issues of the Israeli colonizing of the West Bank manifests itself in the work of the Court when it later has to review security measures taken to protect the settlements. The fact that the separation barrier has proven to be an effective measure to contain the terrorist threat from the OPT does not justify that it is built into the West Bank.

In this critical approach, which in a strict sense, merely is a test of the criticism, even seemingly courageous and controversial rulings like the *Beit Sourik* case have traits of symbols of justice. I would still point out that the ISC has definitely not taken the easiest path in terms of judicial review over governmental actions over the OPT, which is highly admirable. Thus, mentioned factors leaves me with an impression of the HCJ as an institution with high moral principles, stuck in the middle between them and the fact that they indeed are constrained by being an integrated part of one of the conflicting parties. Yet, they have in their activism and the mentioned principles a great *potential* impact of protecting human rights and reduce tension in the Israeli – Palestinian conflict. In the *Beit Sourik* case, my claim is that the ruling *did* create a façade of legitimacy. *It made the fundamental illegality of the separation barrier more humanitarian*; it was a decision easily absorbed and acclaimed, and hence forgotten by most. The barrier is indeed a symbol of a security mean trying to constrain a threat arising from the occupation of the Palestinian territories, while its consequences is an additional mean in the existing matrix of control, creating additional injuries, hopelessness and anger in the Palestinian Territories.

Attachments Enclosed Electronically

1: “*Triangulation Paradigm*” – Methodology paper submitted to the political science department, UiO, fall 2004.

2: “*Israeli Security Politics*” – Term paper in International Security Policy course, submitted to department of political science, spring 2006.

3: “RULING_BeitSourik.pdf” – The official english version of HCJ 2056/04

Map 1 - Map of orders and the alternative routes suggested to them: Tav/84/30, Tav/103/30/03, 104/30/03, 105/30/03

Map 2 – Map of orders and the alternative routes suggested to them: Tav/107/30, Tav/108/30/03, 109/30/03, 110/30/03

IMODbarrier_apr06 – The revised route of the barrier from IMOD, April 2006.

Btselem_barrier0706 – B’tselem’s map of the barrier, September 2006

Wall – stopthewall.org’s map of the West Bank, updated May 2006.

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